TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 367.

W. S. KIRBY, APPELLANT,

vs.

AMERICAN SODA FOUNTAIN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED JULY 24, 1906.

(19,006.)

27869

(19,008.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 357.

W. S. KIRBY, APPELLANT,

vs.

AMERICAN SODA FOUNTAIN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 15, 1904.

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1 *Caption.*

Be it remembered, that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, begun and holden at Dallas, Texas, on the 4th day May A. D. 1903, and which term adjourned on the 27th day of May A. D. 1903, the Hon. Edward R. Meek, United States district judge for the northern district of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY } No. 567. In Equity.

2 *Original Petition.*

Filed May 16th, 1901.

STATE OF TEXAS, }
County of Dallas. }

In the District Court of Dallas County, Texas, — Judicial District, —— Term, 1901.

To the honorable judge of said court:

W. S. Kirby, plaintiff, complaining of American Soda Fountain Co., defendant, represents:

That the plaintiff resides in Dallas county, Texas, and that defendant is a corporation duly incorporated, having a local agent named George Sturgis who resides in Dallas county, Texas:

That heretofore, to-wit; on October 26, 1900, the plaintiff was the owner of a certain soda fountain apparatus, located in his store house, in the city of Dallas, of the value of $5000; that on or about said last mentioned date the said defendant, through its said agent, George Sturgis, represented to the plaintiff that defendant had a certain soda fountain apparatus at some distant point which was excellently constructed, of very superior style and appearance, good workmanship and material, exceedingly handsome and much superior both in style and appearance and value, to the said soda fountain apparatus of plaintiff then in operation in his said store house;

That the said soda fountain apparatus of the defendant was not present, nor did plaintiff have an opportunity to inspect the same, and relying upon the statement made to him by defendant, through its said agent, and the warranties of the defendant then made that the said soda fountain apparatus was well made, handsomely finished,

and of very superior style and appearance, workmanship and value, to the soda fountain apparatus of plaintiff, the plaintiff then and there agreed with the defendant to exchange his soda fountain apparatus for the said soda fountain apparatus of the defendant, and to pay the defendant an additional sum in money to
3 cover the represented difference in value between the two sets of apparatus.

That the plaintiff still relying on said representations, delivered his soda fountain to the defendant which now has the same. That the defendant furnished to the plaintiff a soda fountain apparatus and had the same erected in his store house. But after the same was erected, the plaintiff for the first time had an opportunity to and did discover that said soda fountain apparatus furnished by the defendant was not such as it had agreed to furnish under said contract; that same was not of good workmanship, nor well made, nor of superior design and finish and value to that delivered by plaintiff to defendant, but on the contrary, that said soda fountain apparatus furnished by defendant to plaintiff was broken and cracked; not well made no*t* fitted together; was chipped and defaced, and instead of being of imposing appearance and design, was and is small, insignificant looking and unhandsome, and instead of being superior in value to the soda fountain apparatus delivered by plaintiff to the defendant is and was when the same was furnished by plaintiff to defendant of less value than the one furnished by him in the sum of $1500.00. That plaintiff, when he discovered the inferiority of the soda fountain apparatus furnished by defendant to him, notified the defendant of the defects therein and requested the defendant to return him his said soda fountain apparatus and receive back the apparatus furnished by defendant to him, which the defendant refused to do.

That by reason of the premises and the breach by defendant of its agreement to furnish such an apparatus as it contracted to do, plaintiff has been damaged in the sum of $1500.00.

Premises considered, plaintiff prays that defendant be cited
4 and on final hearing plaintiff have judgment against the defendant for his said damages in the sum of $1500.00, and for costs, and for such other and further relief as he may be entitled to.

McCORMICK & SPENCE,
Attorneys for Plaintiff.

Filed May 16, 1901.

H. W. JONES,
Clerk District Court, Dallas Co.,
By ELMO TRIMBLE, *Deputy.*

Citation.

Issued May 18th, 1901.

The State of Texas to the sheriff or any constable of Dallas county, Greeting:

You are hereby commanded to summon American Soda Fountain Company, to appear before the district court of the 14th judicial district of Texas at the next regular term thereof, to be held in the court house in the city of Dallas on the second Monday in September, A. D. 1901, then and there to answer to the petition of W. S. Kirby filed in said court on the 16th day of May, 1901, against the said American Soda Fountain Company, for suit, said suit being numbered 20332, the nature of which demand is as follows, to-wit:

Suit for damages. Plaintiff alleges that on certain representations of one George Sturgis, agent of the defendant, he contracted for the exchange of a certain soda fountain *the* he owned for one owned by defendant; that he was unable to inspect the one owned by defendant until it — put up and he then discovered that said fountain owned by the defendant was not such as had been agreed upon, that it was not of good workmanship, not of superior design to the one owned by plaintiff, but on the contrary it was inferior, broken and cracked, not well fitted together, was chipped and defaced and was insignificant and unhandsome; that plaintiff when he discovered the inferiority of said soda fountain requested the return of his fountain and tendered defendant theirs; that defendant refused to comply with the request of pl'ff; that by reason of the premises plaintiff has been damaged in the sum of $1500.00.

Wherefore he asks judgment of the court for his said damages costs of suit etc., and you will deliver to the said American Soda Fountain Company, a true copy of this citation.

Herein fail not, but have you then and there this writ, showing how you have executed the same.

Witness: H. W. Jones, clerk of the district court of Dallas county.

Given under my hand and seal of office at Dallas, this 18th day of May, 1901.

[L. S.]

H. W. JONES,
Clerk District Court, Dallas County,
By H. H. WILLIAMS, *Deputy.*

Issued this 18th day of May, 1901.

H. W. JONES, *Clerk,*
By H. H. WILLIAMS, *Deputy.*

Sheriff's Return.

Came to hand on the 18th day of May, 1901, and executed on the 20th day of May, 1901, by delivering to American Soda Fountain Company by and through Geo. Sturgis, general agent for said Co., at its office in Dallas, Co., Texas, the within named defendant in person, a true copy of this writ.

J. ROLL JOHNSON,
Sheriff, Dallas County, Texas,
By T. P. SCOTT, *Deputy.*

Fees.

Serving copy.....	$.75
Mileage.....	10
Total.....	$.85

Defendant's Original Answer.

In the District Court, 14th Judicial District, Dallas County, Texas, Sept. Term, A. D. 1901.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } No. 20332.

6 Now comes the defendant, American Soda Fountain Company, in the above entitled cause, and demurring to plaintiff's original petition filed herein May 15th, 1901, says that the same fails to set up any facts sufficient to constitute any cause of action against this defendant, and of this the defendant prays the judgment of the court, etc.

THOMPSON & THOMPSON,
Att'ys for Defendant.

And for answer in this behalf, the defendant denies all and singular, each and every allegation in plaintiff's petition contained and demands strict proof of the same, and of this *he* puts himself upon the country.

THOMPSON & THOMPSON,
Att'ys for Defendant.

Filed 9 day of Sept. A. D. 1901.

H. W. JONES,
Clerk Dist. Ct., Dallas Co., Tex.,
By W. R. BOWEN, *Deputy.*

Plaintiff's First Amended Original Petition.

Filed Dec. 12th, 1901.

In the District Court of Dallas County, 14th Judicial District of Texas, September Term, 1901.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 20332.

To the honorable judge of said court:

Now comes W. S. Kirby, plaintiff, and having first obtained leave of the court, files this his first amended original petition in lieu of his original petition herein filed May 15th, 1901, and for cause of complaint, plaintiff shows:

That the plaintiff resides in Dallas county, Texas, and that the American Soda Fountain Company, otherwise known as the "Soda Fountain Trust," defendant, is a corporation, duly incorporated, having a local agent named George Sturgis, who resides in Dallas county, Texas.

That, heretofore, to-wit: prior to the 26th day of October, 1900, the plaintiff, who was then a retail druggist doing business
7 in the city of Dallas, was engaged in the reconstruction, remodeling, beautifying and adorning his drug store situated on the corner of Main and Lamar streets, in the city of Dallas, and was then and there in the course of expending a large amount of money in and about the remodeling, beautifying and adorning of his said place of business. That one result of said operation of the plaintiff was to be, that his store room would be double the capacity it had been formerly, and was to be composed of one room, having a frontage on Main street of about 50 feet, and a depth on Lamar street of about 100 feet. That prior to said time plaintiff had been conducting a drug business on the premises, but in a room of 25 feet frontage on Main street, much less handsome than he contemplated making his store house by the improvements aforesaid; all of which was well known to defendant. That the plaintiff then had and owned a soda fountain apparatus of large capacity well-made and handsome in appearance, which was then of about the value of $4000.00. That while plaintiff was engaged in the re-construction of his business house as aforesaid, the defendant, acting through its agent, George Sturgis, approached the plaintiff and falsely and fraudulently for the purpose of inducing plaintiff to enter into the hereinafter mentioned contract with defendant, represented to the plaintiff that the defendant then had at or near the city of Boston, in the State of Massachusetts, a soda fountain

apparatus which was of the very best construction and worth
thousand and twenty five dollars more than the plaintiff's s
fountain apparatus (which was then present and had been ex
ined by the said Sturgis); and that said soda fountain apparatu
defendant was so constructed that the same would deliver s
water through the faucets thereof at a temperature of 33 deg
Fahrenheit; that the said apparatus which defendant then had
the only one which had ever been constructed; that it was in
city of Boston, or near there, and that he (Sturgis) had
8 cently seen and examined the said apparatus; and that s
apparatus of defendant, by reason of its great beauty, wo
be satisfactory to plaintiff as an ornament to his new store.

Plaintiff avers that he relied on said statements and represe
tions made by the defendant through its said agent, Sturgis,
was ignorant of the falsity thereof, but that the said representati
were then false and fraudulent, and known by the said Sturgi
be false and fraudulent, in this:

That the said soda fountain apparatus of the defendant was
of the very best material, but was what is known as "second"
was not worth two thousand and twenty-five dollars more than
soda fountain apparatus of the plaintiff with which he (plaint
and the said defendant, through its agent, Sturgis, also was famil
and that said soda fountain apparatus of defendant would not
liver soda water through its faucets at a temperature of 33 deg
Fahrenheit, and would not be satisfactory to plaintiff on accoun
its beauty as an ornament to his store. And the said Sturgis t
well knew that the said soda fountain apparatus of defendant
not worth as much as the soda fountain apparatus of the plain
and also then and there well knew that the soda fountain appara
of the defendant would not deliver soda water through its fau
at a temperature lower than about 40 degrees Fahrenheit, and
knew that same would not be satisfactory to plaintiff as an or
ment as aforesaid.

Plaintiff further avers that, relying on said representations m
by the defendant through its said agent, Sturgis, the plaintiff agr
with the defendant to exchange his (the plaintiff's) soda fount
apparatus for the soda fountain apparatus of the defendant, and
pay to the defendant in money, $2025.00 in addition. And the
fendant then warranted to the plaintiff that its said soda fount
apparatus was worth two thousand and twenty-five doll
9 more than the soda fountain apparatus of the plaintiff, a
was constructed of the very best materials. And that its s
soda fountain apparatus would deliver soda water through its f
cets at a temp-ature of 33 degrees Fahrenheit; and that its s
soda fountain apparatus would be, in style, quality and appe
ance, satisfactory to the plaintiff as an ornament and adornment
his said drug store. And in addition thereto that its said so
fountain apparatus should be well constructed, made of go
sound, first-class materials and well put together. And that

defendant further agreed with the plaintiff to set said soda fountain apparatus up in the store of the said plaintiff, at its own cost, and to deliver to the plaintiff a carbonating apparatus at a further cost of, to-wit $325.00 (which was afterwards delivered to plaintiff and paid for).

That the said defendant undertook to make a memorandum of a part of the transaction between plaintiff and defendant in writing on one of its order blanks containing a great deal of printed matter in small type, for the signature of the plaintiff, which order blank was not adapted for writing in the warranties, which defendant had made to the plaintiff, and which order blank is simply an informal memorandum and does not purport to contain all the terms of the contract between the plaintiff and the defendant made and entered into as aforesaid. Or, if plaintiff was mistaken in this, then he alleged that the defendant fraudulently or by mistake, omitted from the said contract many of the most material parts thereof, viz; the warranties aforesaid; the agreement as to the exchange of fountain aforesaid, and the purchase and sale of said carbonatin g machine aforesaid, and represented to the plaintiff that the said order was simply a memorandum as to the payment of the $2025.00 aforesaid, and the security therefor; and the plaintiff relying on the fact that the said order did not contain or purport to contain all the agreements between the parties, signed the same without reading the said order in full. And plaintiff avers that the said agreements and stipulations between the plaintiff and defendant as to the exchange of soda fountain apparatus and the warranties of defendant, and the sale of said carbonating machine and the payment of the balance by plaintiff to defendant and the lien therefor were made verbally, and only a part thereof was intended to be put in writing that is to say, the part thereof relating to the payment of said $2025.00 and the retention of a lien on the apparatus to be delivered by the defendant to plaintiff for the payment thereof, and that neither the plaintiff nor the defendant understood then that said memorandum signed by the plaintiff, represented the entire contract entered into between the plaintiff and the defendant, and that plaintiff never was notified by defendant of its acceptance or any written contract between them.

Plaintiff further represents that the defendant received from the plaintiff his soda fountain apparatus and moved the same away from plaintiff's place of business before it delivered its soda fountain apparatus to plaintiff, and has converted the same to its, the defendant's own use and benefit, and that the said soda fountain apparatus delivered by the plaintiff to the defendant under the said contract, then and there was of the value of $4000.00. That afterwards, the defendant shipped to the plaintiff, at Dallas, a soda fountain apparatus and had the same set up in plaintiff's drug store when for the first time he had opportunity to examine the said soda fountain apparatus, and could not then examine the same

until it was fully set up. That after the said soda fountain was erected by defendant in plaintiff's store, the plaintiff for the first time had an opportunity to examine the same, and then discovered that the same was not such an apparatus as the defendant had represented it would be and had
11 agreed and bound itself to furnish to the plaintiff under said contract, in that, *in that* the said soda fountain apparatus so furnished by the defendant to the plaintiff would not deliver soda water at a temp-ature below 40 degrees Fahrenheit and was chipped and defaced and cracked and illy joined together, and was not of good workmanship nor material, nor well made, nor of a superior design and finish, but insignificant looking and unhandsome looking in style and beauty as an ornament, and instead of being superior in value by $2025.00 to the soda fountain apparatus delivered by the plaintiff to the defendant, was, as a matter of fact of less value than the same, in the sum of at least, $2500.00, and was not satisfactory to plaintiff as an ornament to his store. That plaintiff, when he discovered the inferiority of the soda fountain apparatus furnished by the defendant to him, notified the defendant of his dissatisfaction therewith and requested the defendant to return to him (the plaintiff) the said soda fountain apparatus which he had delivered to it and which the defendant then had on hand, and receive back the apparatus furnished by defendant to plaintiff, which the defendant refused to do. Plaintiff further represents that so far as capacity and actual utility *was* concerned, the soda fountain apparatus which he had prior to his entering into this contract with the defendants was reasonably equal to the demands of his business, and fully equal to the apparatus which the defendant agreed to furnish to plaintiff under said contract and that the only inducement moving *to* plaintiff to enter into the contract with the defendant for a new apparatus was that he might with said new apparatus more effectually and completely than with his old one beautify and adorn and render attractive his drug store, and that it would be worth *an* account of these excessences $2025.00 more than plaintiff's old apparatus, which fact was well known to the defendant when said contract was entered into, and was fully discussed between the plaintiff and the defendant's said agent.

12 Plaintiff further avers that on account of the failure of said machine and apparatus furnished by the defendant to the plaintiff to exceed, or even to equal in beauty and general appearance as an ornament to his store, the soda fountain apparatus which he delivered to the defendant in exchange therefor, the said apparatus so received by him was not satisfactory to the plaintiff as an ornamental piece of furniture and ought not to have been satisfactory to him. And in addition, said apparatus was defective as hereinbefore set out, and thereby failed to conform to the said representations and warranties.

Plaintiff further represents that the defendant has put it beyond its power to return to the plaintiff the soda fountain apparatus de-

livered by him to it on account of the defendant's having sold the same. Plaintiff further represents that the soda fountain apparatus delivered by the defendant to the plaintiff was not, when so delivered, and is not now, worth more than the sum of $1500.00. And by occasion of the exchange effected through the fraudulent and deceitful conduct of the defendant, and on account of the inferior apparatus furnished by the defendant to the plaintiff as aforesaid the defendant has become liable and promised to pay to the plaintiff the sum of $2500.00. But though payment thereof has been demanded by plaintiff of the defendant, the defendant has wholly failed to pay the same or any part thereof, to plaintiff's great damage in the said sum of $2500.00.

Wherefore, premises considered, and defendant having heretofore been cited and having answered herein, plaintiff prays that this obligation to pay the defendant $2025.00 difference according to said contract be cancelled, and that the plaintiff have and recover of the defendant the sum of $2500.00 damages, and costs, and such other and further relief as he may be entitled to in the premises.

McCORMICK & SPENCE,
Att'ys for Plaintiff.

13 Filed 12 day of Dec. A. D. 1901,

H. W. JONES,
Clerk Dist. Ct., Dallas Co., Texas,
By W. R. BOWEN, *Deputy.*

Petition for Removal to U. S. Circuit Court, Fifth Circuit and Northern District of Texas.

Filed January 22nd, 1902.

In District Court, 14th Judicial District, Dallas County, Texas, December Term, A. D. 1901.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 20332.

To the honorable district court, 14th judicial district, Dallas county, Texas:

Your petitioner American Soda Fountain Company, defendant in the above entitled cause, respectfully shows to this honorable court that the matter and amount in dispute in the above entitled cause exceeds the sum or value of two thousand dollars, exclusive of interest and costs; that by his first amended original petition filed herein December 12th 1901, and at the present term of this honorable court, the plaintiff increased his demand from fifteen

hundred dollars to twenty-five hundred dollars; that this suit is of a civil nature, plaintiff's action being for damages for breach of contract and for failure of warranty. That the controversy in said suit is, and at the time of the commencement of this suit was, wholly between citizens of different States, and that your petitioner, defendant in the above entitled suit was, at the time of the commencement of this suit, and still is, a private corporation duly incorporated under the laws of the State of New Jersey, and is an inhabitant and resident of and citizen of the State of New Jersey, and a non-resident of the State of Texas, and that the plaintiff, W. S. Kirby, was, at the time of the institution of this suit, and still is a resi-
14 dent of and a citizen of the city and county of Dallas, and State of Texas.

And your petitioner offers herewith a good and sufficient surety for *his* entering in the circuit court of the United States, for the northern district of Texas, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded in said circuit court of the United States, if said court should hold that this suit was wrongfully or improperly removed thereto. And *he* prays this honorable court to proceed no further herein excepting to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said circuit court of the United States in and for the northern district of Texas, and *he* will ever pray.

AMERICAN SODA FOUNTAIN CO.,
By J. W. THOMPSON, *Att'y.*

THOMPSON & THOMPSON,
Attorneys for Petitioners,
American Soda Fountain Co.

THE STATE OF TEXAS, }
County of Dallas. }

I, J. W. Thompson, being duly sworn, do say that I am a member of the firm of Thompson & Thompson, attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

J. W. THOMPSON.

Subscribed by said J. W. Thompson in my presence, and by him sworn to before me this the 22 day of January, A. D. 1902.

H. W. JONES,
Cl'k Dist. Court, Dallas Co.,
[L. S.] By W. R. BOWEN, *Dep.*

Filed 22 day of Jan. A. D. 1902.

H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By R. W. BOWEN, *Deputy.*

15 *Bond for Removal to U. S. Circuit Court.*

District Court, 14th Judicial District, Dallas County, Texas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 20332.

Know all men by these presents: That *I*, American Soda Fountain Company, as principal, and —— —— as sureties, are held and firmly bound unto W. S. Kirby in the penal sum of five hundred ($500.00) dollars, for the payment whereof well and truly to be made unto the said W. S. Kirby his heirs, and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents:

Yet, upon these conditions: The said The American Soda Fountain Company having petitioned the district court of the 14th judicial district, Dallas county, Texas, for the removal of a certain cause therein pending, wherein W. S. Kirby is plaintiff and The American Soda Fountain Company defendant, to the circuit court of the United States in and for the fifth circuit and northern district of Texas, at Dallas.

Now if the said The American Soda Fountain Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 22 day of Jan. A. D. 1902.

AMERICAN SODA FOUNTAIN CO.,
By J. W. THOMPSON.
EDW. O. TENISON,
C. R. BUDDY.

Approved:

T. F. NASH, *Dist. Judge.*

Filed 22 day of Jan. A. D. 1902.

H. W. JONES,
Clerk Dist. Ct., Dallas Co., Tex.,
By W. R. BOWEN, *Deputy.*

16 *Order of Removal.*

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } 20332.

FEBRUARY 3RD, 1902.

This cause coming on this day to be heard upon the petition of American Soda Fountain Company to remove same to the circuit court of the United States for the northern district of Texas, said petition being heard by the court and it appearing that a good and sufficient bond has been filed, and that said petition shows grounds for removal, the prayer of the said American Soda Fountain Company is granted, and its bond approved, and this cause ordered removed to the circuit court of the United States for the northern district of Texas and the clerk of this court will make out a transcript of the record in this cause to be filed in the United States court for the said district of Texas.

Bill of Costs.

Filing petition and docketing		35
Issuing citation and copy	1	25
Sheriff Johnson serving citation		85
Filing answer and entering appearance		30
Jury fee paid by pl'ff	5	00
Franting plaintiff leave to amend		75
Filing 1st amended original petition		15
Granting plaintiff leave to amend		75
Plaintiff demands a jury		75
Filing int'ys to Geo. H. Clapp *et al.*, def't		15
Filing X int'ys to Geo. H. Clapp *et al.*, pl'ff		15
Issuing comm. to Geo. H. Clapp *et al.*, def't		75
Taking affidavit of def't's att'y		50
Filing bond for removal		15
Filing petition for removal		15
Entering order of removal	1	00
17 Making transcript for removal, def't	7	35
Taxing costs, def't		25
	$20	60

Clerk's Certificate.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } No. 20332.

THE STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk, district courts, Dallas county, Texas do hereby certify that the foregoing 14 pages contain a true and correct transcript of all the proceedings had in the above numbered and entitled cause (with the exception of the deposition of Geo. H. Clapp *et al.*) as the same now appear of record and on file in my office.

Given under my hand and seal of office, at Dallas, this the 10th day of February, A. D. 1902.

H. W. JONES,
Clerk District Court, Dallas County, Texas,
[SEAL.] By ELMO TRIMBLE, *Deputy.*

Endorsed as follows: No. 567 In eq. W. S. Kirby *vs.* American Soda Fountain Company, Filed 12 day of May 1902 J. H. Finks, clerk. By W. A. Porter, deputy.

18 *Demurrer, Answer, and Cross-complaint of American Soda Fountain Company.*

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } In Equity.

The demurrer of American Soda Fountain Company, defendant, to the first amended original bill of complaint of W. S. Kirby, complainant, filed in the State court December 12th, 1901.

This defendant, American Soda Fountain Company, by protestation, not confessing or acknowledging all or any of the matters or things the said bill of complaint contains to be true in such manner and form as the same are set forth and alleged, demurs to said bill, and for cause of demurrer says:

1.

That the defendant's residence or place of abode is not stated in said bill.

2.

That said bill is deficient in certainty in this; that it does not state under the laws of what State, or under what laws the defendant is incorporated or has any legal existence, or of what State the defendant is a citizen.

3.

That all allegations in said bill in reference to plaintiff enlarging, adorning and beautifying his store are impertinent, and should be stricken from said bill.

4.

That the plaintiff has not in, or by the said bill, made or stated such a cause of action as doth or ought to entitle him to any such relief as is thereby sought or prayed for from or against this
19 defendant.

And for further grounds of demurrer to be stated upon a hearing hereof.

Wherefore, this defendant demands the judgment of this honorable court, whether it shall be compelled to make any further answer to the said bill or to any of the matters or things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

THOMPSON & THOMPSON,
Solicitors and Counsel for Defendant, American Soda Fountain Company.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

J. W. THOMPSON,
Of Counsel for the Defendant.

THE STATE OF TEXAS, }
County of Dallas. }

J. W. Thompson, being first duly sworn, deposes and says: I am att'y and counsel for The American Soda Fountain Company the above named defendant. The foregoing demurrer is not interposed for delay. This affidavit is made by said J. W. Thompson for the reason that the defendant is out of the district.

J. W. THOMPSON.

Sworn to and subscribed before me this the 12th day of May by J. W. Thompson.

D. W. BOWSER,
[SEAL.] *Notary Public, Dallas County, Texas.*

Answer.

The answer of The American Soda Fountain Company, defendant.

And the said American Soda Fountain Company, not waiving its said several demurrers, but wholly relying and insisting
20 thereon, in answer to so much of said bill as it is advised it is material and necessary for it to answer, says as follows:

1.

Defendant says that its correct and legal name is American Soda Fountain Company, and denies that it is known as the "Soda Fountain Trust," and denies that George Sturges is and was its local agent.

2.

Defendant denies that on the 26th, day of October 1900, the plaintiff was the owner of a soda fountain apparatus of large capacity, well made and handsome in appearance, which was then of about the value of four thousand dollars.

Defendant alleges the facts to be; that said soda fountain apparatus of the plaintiff was second hand when plaintiff acquired the same, and had been in use for more than six years prior to October 26th, 1900, and then was not of a value exceeding $1100.00, and when new was not worth exceeding $2,500.00.

3.

This defendant denies that it, acting through George Sturges, or through any agent, approached the plaintiff and fraudulently and falsely, for the purpose of inducing plaintiff to enter into the contract mentioned in plaintiff's complaint, represented to the plaintiff that the defendant then had at or near the city of Boston, in the State of Massachusetts a soda fountain apparatus, which was of the very best construction, and well worth two thousand and twenty-five dollars more than plaintiff's soda fountain apparatus, and that said soda fountain apparatus of the defendant was so constructed that the same would deliver soda water through the faucets thereof at a temperature of 33 degrees Fahrenheit; that the said apparatus which the defendant then had was the only one which had ever been constructed; that it was in the city of Boston or near there, and that he, Sturges, had recently seen or examined the
21 same and that said apparatus of defendant's by reason of its great beauty, would be satisfactory to plaintiff as an ornament to his new store.

Defendant alleges the facts to be that the plaintiff, on or about October 26th, 1900, wished to purchase a new soda fountain apparatus and called upon George Sturges, that the defendant, acting

through its salesman, the said George Sturges, exhibited to the plaintiff descriptions, designs and photographs of machines manufactured and sold by the defendant; that from the descriptions, designs and photographs, the plaintiff, who had been in the drug business for many years, and who was familiar with soda fountains, selected the apparatus he wished to purchase with the difference that he wished the machine to be of larger capacity than that represented by the photographs, but in other respects, as to the quality, style and apparatus, the same, The said Sturgis then and there represented to the plaintiff that the size of machine he wished, was not carried by the defendant in stock, but was of an extra size, which defendant would manufacture and ship to plaintiff; that the machine so selected by the plaintiff was what is known as Special Versailles, onyx with W & G top meaning white and gold top, with 22 syrup faucets, 3 soda draught tubes and four (4) mineral draught tubes; that the price agreed upon by the plaintiff and the defendant, acting through the said Sturges, for said machine and for a constant carbonate of 220 volts with pipes and connections and the attachments and furnishings freight and setting up at Dallas was $3,219.00; that the defendant agreed to take plaintiff's old machine in part payment for the new purchase and allow the plaintiff credit on said sale for the sum of $1,194.00 for the same, leaving the balance due the defendant of two thousand and twenty-five ($2,025.00) dollars; that thereupon, on October 26th, 22 1900, plaintiff executed a written order and contract for said Vercailles apparatus, carbonater, etc, etc, in which written instrument plaintiff agreed to pay defendant two thousand and twenty-five dollars for said property delivered and set up in plaintiff's store at Dallas, Texas, as follows: One hundred dollars, ($100.00) on receipt of bill of lading of goods, and the balance in thirty-six (36) equal monthly payments beginning April 1st, 1901 with interest at 5 per cent. per annum from April 1, 1901, and to execute notes therefor, that said written order and contract of date October 26th 1900, stipulated for and retained a mortgage lien upon said apparatus, carbonater &c., to secure the payment of the said sum of two thousand and twenty-five dollars, a copy of said written order and contract is hereto attached, marked "Exhibit A" and made a part hereof and contains the contract and agreement made and entered into by and between the plaintiff and the defendant. And said contract states on its face that there are no other conditions or agreements in reference to said sale except those stated in said contract, and that no claims will be made by the plaintiff for anything not specified therein. That defendant manufactured said special machine according to the terms of the contract between plaintiff and defendant, and shipped said goods on or about February 8th, 1901, and soon thereafter set up said apparatus in plaintiff's store, as it had agreed to do, and in all things fully complied with its said contract; that the plaintiff paid the defendant the sum of three hundred and twenty-five ($325.00) dollars when

said machine and carbonater were placed and set up in his store, but has failed and refused further to comply with his contract or to pay defendant any and further additional sums of money; that defendant has attached hereto a statement marked "Exhibit B" showing the goods ordered by plaintiff, and shipped by defendant,
23 as hereinbefore stated together with the prices and respective values thereof.

4.

Defendant denies that it warranted to the plaintiff that its said soda fountain apparatus was worth two thousand and twenty-five dollars more than the soda fountain apparatus of the plaintiff and was constructed of the very best material and that its said soda fountain apparatus would deliver soda water through its faucets at a temp-ature of thirty-three (33°) degrees Fahrenheit, and that said soda fountain apparatus would be in style, quality and appearance satisfactory to plaintiff as an ornament and adornment to his drug store, and in addition thereto would be well constructed and made of good, first-class material and well put together.

5.

Defendant denies that it fraudulently or by mistake omitted from said contract many of the most material parts thereof, namely; the warranties, as set out in the above paragraph of this answer, the agreement as to the exchange of fountains, and the purchase and sale of said carbonating machine aforesaid. And denies that it represented to the plaintiff that said order was simply a memorandum as to the payment of the two thousand and twenty-five dollars, aforesaid and the security therefor. Defendant avers the facts to be that the plaintiff had every opportunity to examine the written contract and did so examine it and was familiar with its contents and stipulations, and both the plaintiff and the defendant understood that said writing represented the contract between them.

6.

Defendant denies that the said soda fountain apparatus so manufactured and shipped by defendant to the plaintiff was not of the
24 very best material, but was what was known as "second," and said defendant alleges the facts to be that said apparatus was of the very best material, was handsome, in appearance, was skillfully put together, and was, together with the other goods called for in said contract with the freight and setting up expenses of the value of $3,219.00, and that the soda fountain apparatus so manufactured by defendant, together with the other goods called for in said order, exceeded in value the worth of the plaintiff's apparatus by at least the sum of two thousand and twenty-five dollars.

7.

Defendant denies all of the allegations of fraud, and fraudulent representations and deceitful practices contained in plaintiff's said bill, and says: that all allegations in said bill of complaint charging fraudulent and deceitful representations and practice on the part of the said Sturges, as to the character, kind, quality and description of either or both of said soda fountain apparatuses, as to the terms of sale, as to the warranties, and as to the execution of the contract by the plaintiff, are wholly false and untrue, and that the plaintiff knows them to be false and untrue.

8.

Defendant further alleges that it manufactured and shipped to the plaintiff a special Versailles onyx apparatus with white and gold top, with 22 syrup faucets, 3 soda dra-ght tubes, 4 mineral draught tubes and other attachments and furnishings and also one constant carbonater with pipes and connections; that the value of said apparatus, attachments etc., set up in complainant's store was of the value of $3,219.00, and was so represented by the said Sturges to the plaintiff, that plaintiff's machine was old and second hand, and was of the value of not exceeding $1,100.00 that defendant, acting through its salesman, Sturges, and the plaintiff agreed upon the values of said respective apparatus and attachments; that the contract was reduced to writing and signed by the plaintiff, a copy of which is hereto attached, marked "Exhibit A" and made a part of this answer.

Defendant denies that it fraudulently or by mistake omitted from said contract many of the most important parts thereof, namely; the warranties, aforesaid, the agreement as to the exchange of fountains aforesaid and the purchase and sale of the said carbonating machine aforesaid, and represented to the plaintiff that the order was simply a memorandum as to the payment of the two thousand and twenty-five dollars aforesaid and the security thereof. Defendant says that the price of the plaintiff's machine was agreed upon, and that defendant received said old machine from the plaintiff and allowed him a credit of $1,194.00 upon his said purchase, and that thereupon the plaintiff signed the written order marked "Exhibit A" wherein and whereby he agreed to pay to said defendant said sum of two thousand and twenty-five dollars, as per the terms of said contract hereinbefore set out and hereto attached.

9.

Defendant says that the apparatus so selected and ordered by the plaintiff was manufactured and shipped by defendant and set up in plaintiff's store according to contract, and defendant denies that said apparatus was not as the defendant had represented it would be, and had agreed and bound itself to furnish to the plaintiff under

the said contract; that said machine was not chipped, or cracked or defaced or illy joined together, or of bad workmanship or material, but was of good workmanship and material, or superior design and finish and handsome in style and beauty and would deliver soda water through its faucets at a temp-ature less than 40° Farh., and was, with the carbonater and other goods of value exceeding by two thousand and twenty-five dollars the soda fountain apparatus delivered by plaintiff to the defendant; that in setting up said
26 machine, a small tool was accidentally dropped, made a small insignificant chip, which defendant then and there agreed to remove or to allow for, and is still ready so to do.

Defendant denies that said soda fountain apparatus attachments, etc., *was* of less value by twenty-five hundred dollars than the soda fountain apparatus of plaintiff, but defendant alleges the facts to be that the said soda fountain apparatus attachments etc., set out in "Exhibit A" hereto attached exceeded in value the apparatus of the plaintiff by at least the sum of two thousand and twenty-five dollars.

10.

Defendant denies that the plaintiff ever requested it to return to him the soda fountain apparatus, which he had delivered to the defendant and receive back the apparatus furnished by the defendant to plaintiff until long after plaintiff had received said apparatus; that said apparatus was delivered and set up in plaintiff's store about the middle of March, 1901; that plaintiff used said machine until about the middle of May, 1901, and then offered to return the same and take back his old fountain; that by this time, the defendant had disposed of his old fountain it had received from plaintiff, which fact the plaintiff well knew when he made said offer.

Defendant denies that so far as capacity and actual utility was concerned, the soda fountain apparatus, which plaintiff had prior to his entering into the contract with the defendant, was fully equal to the apparatus, which defendant agreed to furnish the plaintiff and did furnish the plaintiff under said contract.

11.

The defendant denies that the apparatus so delivered by it to the plaintiff is not worth more than the sum of fifteen hundred dollars, and denies that any exchange was effected through fraudu-
27 lent representations and deceitful conduct of the defendant, and denies that the defendant is indebted to the plaintiff in the sum of twenty-five hundred dollars, as claimed in plaintiff's complaint, or in any other amount.

Defendant further alleges that the plaintiff is justly indebted to the defendant in the sum of two thousand and twenty-five dollars, less a credit of three hundred and twenty-five dollars paid on said contract; that to secure said balance defendant has a mortgage lien

upon said soda fountain apparatus and carbonater with their attachments, etc., etc.,

Wherefore, the premises considered, defendant says that plaintiff should take nothing by his said suit, and prays for judgment over and against the plaintiff for the sum of seventeen hundred dollars, and for foreclosure of its mortgage lien and for costs of suit, etc., etc., as in duty bound, the defendant will ever pray.

AMERICAN SODA FOUNTAIN COMPANY,
By J. W. THOMPSON, *Its Attorney and Counsel.*

THOMPSON & THOMPSON,
Solicitors & Counsel for Defendant,
American Soda Fountain Company.

THE STATE OF TEXAS, }
County of Dallas. }

Before me, D. W. Bowser, a notary public within and for the county of Dallas, State of Texas, on this day personally appeared George Sturges, who, being by me duly sworn, says on oath: My name is George Sturges; I am the George Sturges referred to in the bill of complaint and in the above and foregoing answer and am and was on October 26th, 1900., the representative and salesman for American Soda Fountain Company, defendant, and made the sale referred to in the above answer to the plaintiff's com-
28 plaint, and know all the terms stipulations and conditions thereof. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, excepting as to matters stated on information and belief, and, as to those, I believe them to be true.

I make this affidavit because I have a personal knowledge of all the facts, and because the American Soda Fountain Company is a citizen and an inhabitant of the State of Massachusetts and is out of this district.

GEO. STURGES.

Sworn to and subscribed before me by George Sturges, this the 12th day of May, A. D. 1902.

[SEAL.]

D. W. BOWSER,
Notary Public, Dallas Co., Texas.

"EXHIBIT "A."

Salesman George Sturges.

DALLAS, TEXAS, *Oct. 26th*, 1900.

American Soda Fountain Co., Boston, Mass.:

Forward the following described soda water apparatus, and upon receipt of bill of lading or tender of goods I will honor sight draft

or other demand for $100 and the balance I promise to pay in monthly sums as follows 36 equal payments beginning April 1st 1901, interest from Apr. 1st, 1901 with interest at 5 per cent. from date of shipment, with each payment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order, and maturing as above set forth and will execute such other papers as may be necessary under the laws of the State to protect the title of American Soda Fountain Co., against all third parties. I agree to insure said apparatus for $—, the loss, if any, payable to American Soda Fountain Co., as its interest may appear, and to keep the same insured
29 until all payments are made. The delivery of such apparatus &c., to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of American Soda Fountain Co. till paid for.

In case American Soda Fountain Co., is to take any second hand soda water apparatus in exchange, the undersigned warrants it free from all liens, and agree to put such apparatus in as good condition as possible and pack and ship it as directed by said American Soda Fountain Co.

Description of apparatus? State name of apparatus and varieties of marbles. Also wood and finish of top. Special Versailles onyx & W. & G. top. 1 constant carbonator 220 volts 10 ft. supply to conn. app.:

Size of apparatus. State number syrup faucets and draught tubes required. 22 syrup faucets, 3 soda draught tubes 4 mineral draught tubes. Prices. Apparatus $— carbonator — generator, — fountains — tumbler washer — tumbler holders — tumblers — marble slabs — pipe — juices. — $2025.

Mineral water name plates (check those wanted) Kissengen, vichy, seltzer, pavilion, Congress, Peruvian beer, Ottawa beer, ginger ale, ale, root beer, spear beer. Syrup name plates (check those wanted) Lemon, vanilla, sarsaparilla, pineapple orange, ginger, orgeat, strawberry, raspberry ambrosia, coffee cream, tonic, hock, claret, nectar, rose, chocalate, blackberry, don't care, maple, wild cherry, catawba, sherbet, winter green, bananna, plain, checkerberry, tea.

Length of supply pipe. Pipe is furnished extending two feet under the counter. If more is wanted the price is fifteen cents per foot. State length of each supply pipe from bottom of apparatus. Also whether a pipe coupling or the fountain clamp joint is required.
No. clamps will be furnished with either apparatus or fountain
30 unless specified on order. Necessary clamps will be sent without charge with apparatus when so specified, not exceeding one for each draught. 1–50 ft. supply M. & F. M. f- clamp — constant carbonator — volts (if alternating current give voltage at point of installation) — cycles, — phases — reliable carbonator — lbs. city water pressurem — liquified gas outfit No —. — No. — generator — fountains. 24 No. j tumbler holders — No —

tumblers 24–7 in spoons — — No. — tumbler washer. — tumbler drainer — change stands. 1–1925 pitchers 1–1879 bowls 1–1925 spoon holders — syrup sbottles — shakers — trays — crushed fruit bowl — two way cock, — ice shaver — lemon squeezer.

1 base marble slab, — dispensing slab. (Give exact diagram on separate sheet indicating how the edges are to be finished and where apparatus is to be placed. State on paper diagram which is the upper side.

Juices &c. 2 silver lids 1–1169 straw vase.

Transportation (avoid lines requiring reshipment if possible When shipped: Mention the date, (if possible, that delays in transportation may be obviated. Morgan line as soon as possible. Freight and setting up charges to be paid by consignee.

This order cannot be countermanded and this is fully understood by the signer. There are no other conditions or agreements with your salesman except those herein stated, and no claim will be made by me for anything not specified herein.

Name of bank to which papers are to be sent for collection: ——

W. S. KIRBY.

(Write name and send business card.)

References: App. & earb. to be put up in store at price sold.

Exhibit "A."

30½ $—. —— —, 190–.

For value received, —— after date —— promise to pay to the order of American Soda Fountain Co. —— dollars with interest at 6% ——. The consideration of this and other notes is certain soda water apparatus and appurtenances described in contract between —— —— and the said American Soda Fountain Co., bearing date —— and which —— have received of said American Soda Fountain Co.

Nevertheless it is understood and agreed by and between —— —— and the said American Soda Fountain Co., that the title to the above mentioned property does not pass to —— —— and that until all said notes are paid the title to the aforesaid property shall remain in the said American Soda Fountain Co. which shall have the right, in case of non-payment at maturity of either of said notes without process of law, to enter and retake, and may enter and retake immediate possession of the said property, whereever it may be, and remove the same.

Payable at the —— bank.

—— ——.

Due ——.

31 "EXHIBIT B."

1 special Versailles onyx soda fountain apparatus, W. & G. top	$2,620.00
1 marble base slab	45.50
2 dozen J. tumbler holders	24.00
2 dozen bar spoons, 7 inch	10.00
1 # 1925 spoon holder	2.75
1 # 1169 straw vase	2.25
1 # 1899 sugar bowl	6.00
2 silver lids	20.00
1 50 feet B. T. supply pipe	7.50
1 # 1925 two quart cream pitchers	6.00
Freight and setting up expanses	150.00
	$2,894.00
1 constant carbonator, 220 volts, 10 feet supply to connect with apparatus	325.00
	$3,219.00

Cross-complaint.

Cross-complaint of American Soda Fountain Company.

For cross-complaint and for affirmative relief, your orator shows to the honorable judges of the circuit court of the United States in and for the northern district of Texas, at Dallas.

First. That your orator is a private corporation duly organized and existing under the laws of the State of New Jersey, and that it is an inhabitant and citizen of said State; that its name is American Soda Fountain Company; that it comes into court at the suit of W. S. Kirby, who is a citizen of the State of Texas, and resides in Dallas county in said State of Texas.

Second. That heretofore, to-wit on the 12th day of December, 1901, the said W. S. Kirby filed his first amended petition
32 in the district court of the 14th judicial district of Texas, complaining of your orator, and alleging in substance that on or about the 26th day of October, 1900, he made and entered into a contract with your orator, acting through its agent, George Sturges, by the terms of which he agreed to exchange a soda fountain apparatus, which he then had in his store at Dallas, Texas, for a soda fountain apparatus of your orator which was then in or near the city of Boston, in the State of Massachusetts; that by the false and fraudulent representations and the warranties of the said Sturges, he, Kirby, was persuaded and induced to make said exchange and to agree to pay your orator the sum of two thousand and twenty-

five, ($2,025.00) dollars in addition to his apparatus, and signed a written obligation to pay said $2,025.00; that the apparatus delivered to him, by your orator was not as represented and warranted by the said Sturges, and instead of being worth $2,025.00 more than his, Kirby's, apparatus was really worth twenty-five hundred ($2,500.00) dollars less,—complainant's apparatus being of the value of four thousand, ($4,000.00) dollars and your orator's apparatus being of the value of only $1,500.00; and that complainant was thereby damaged in the sum of twenty-five hundred dollars.

Complainant, in said bill, prays for the cancellation of his written obligation to pay your orator $2,025.00; for the recovery of twenty-five hundred dollars damages, the difference in the value of the two apparatuses, for costs, and for such other and further relief as he may be entitled to. All of which allegations your orator denied, and now expressly denies: That said cause was, afterwards, by your orator, removed into this honorable court.

3.

Your orator complaining of said W. S. Kirby, complainant, says; that on or about the 26th day of October 1900, complain-
33 ant, called upon and approached your orator's salesman, George Sturges, for the avowed purpose of purchasing a new soda fountain apparatus for his drug store, at Dallas, Texas, that your orator, through its salesman George Sturges, exhibited to complainant descriptions, designs and photographs of soda fountain apparatus manufactured and sold by your orator and informed him of the prices thereof; that from said descriptions, designs and photographs the complainant, who had been in the drug business for many years and who was familiar with soda fountain apparatuses, selected an apparatus, with the difference that he desired said apparatus to be of larger capacity than that represented by the photograph but in other respects, as to the quality, style and workmanship and appearance, to be the same as the photograph. The said Sturges, then and there represented to the complainant that the apparatus he had selected, being an extra size, was not carried by your orator in stock, but would have to be manufactured by it and shipped to complainant; that the machine so selected and purchased by the complainant was what was known as a special Versailles onyx with W. & G. top (meaning white and gold top) with 22 syrup faucets, 3 soda draught tubes and 4 mineral draught tubes; that the price and fair market value of said apparatus was $2,620.00; that in addition to said apparatus, the complainant ordered and purchased of your orator other goods, attachments, furnishings, etc., which your orator agreed to deliver at complainant's store, in Dallas, Texas, and set up and adjust said apparatus for the total sum of three thousand, two hundred and nineteen ($3,219.00) dollars. A list of said goods with the prices thereof is as follows:

34	1 special Versailles onyx soda fountain apparatus W. & G. top	$2,620.00
	1 marble base slab	45.50
	2 dozen J. tumbler holders	24.00
	2 dozen bar spoons, 7 inch	10.00
	1 #1925 spoon holder	2.75
	1 #1169 straw vase	2.25
	1 #1879 sugar bowl	6.00
	2 silver lids	20.00
	1 50 foot B. T. supply pipe	7.50
	1 #1925 two quart cream pitcher	6.00
	Freight and setting up expenses	150.00
		$2,894.00
	1 constant acrbonator, 220 volts, 10 foot supply to connect with apparatus	325.00
		$3,219.00

That the complainant had on hand an old soda fountain apparatus which had been in use some six or seven years, and was second-hand when complainant acquired the same, and, when new was not worth exceeding twenty-five hundred dollars, ($2500.00) *dollars*, and in its then present condition was not worth exceeding eleven hundred, ($1100.00) dollars. That your orator agreed with complainant to take said old apparatus of complainant in part payment for said new fountain, carbonater and other goods, the price of which was three thousand, two hundred and nineteen, ($3,219.00) dollars and to allow complainant the sum of eleven hundred and ninety-four, ($1194.00) dollars for said old machine, leaving a balance due your orator of two thousand and twenty-five, ($2,025.00) dollars. That upon said October 26th, 1900, the complainant executed and delivered to your orator a written order and contract, dated October 26th 1900, in which written instrument complainant ordered said goods, and agreed and bound himself to pay to your orator $2,025.00 for said apparatus, carbonator, attachments,
35 furnishings, etc. and other goods heretofore set out, delivered and set up in complainant's store upon the terms as follows: One hundred dollars cash upon receipt of bill of lading, or tender of goods, and the balance in thirty-six (36) equal monthly payments beginning April 1st, 1901, with interest from April 1st, 1901, at five per cent. per annum. And for said balance and interest, complainant agreed to execute and deliver contract notes of like tenor, and form to one printed on the back of said order and maturing as above set out: that said written order and contract and form of note on the back thereof stipulated for and retained a mortgage lien in favor of your orator upon said apparatus, carbonator, goods, etc., to secure the payment of said sum of $2,025.00 as aforesaid. A copy of said order and contract together with the form of said notes is hereto

attached, marked Exhibit "A," and made a part of this cross-complaint.

Fourth. Your orator further shows that upon receipt of said order above referred to and marked Exhibit "A," it accepted the same, and afterwards manufactured said apparatus in accordance with the terms of said order and contract, and that thereafter, on or about the 8th day of February, 1901, shipped said soda fountain apparatus to the defendant, at Dallas, Texas, together with the other goods called for in said order and that soon thereafter, said apparatus, carbonator, furnishings, etc., and other goods were delivered to said complainant at his store in Dallas, Texas, and said apparatus was adjusted, put together and set up in complainant's store without cost or expense to complainant.

That said apparatus, carbonator and other goods were strictly and in all respects in accordance with the order and contract of
36 the complainant and your orator, in all things, strictly complied with the terms of the order and contract of complainant.

Fifth. Your orator further says that said apparatus was made of the very best material, was skillfully put together, was exceedingly handsome in appearance, being furnished with mirrors and fixtures for electric lights, and was, with the other goods so shipped to complainant, in strict compliance with the order of the complainant, and when set up in complainant's store well worth the contract price thereof, to-wit: three thousand, two hundred and nineteen dollars, ($3,219.00) and exceeded in value, by at least two thousand and twenty-five dollars, the apparatus of the complainant, which was old and second hand and greatly out of order, and not exceeding in value eleven hundred ($1100.00) dollars.

Sixth. That soon after the delivery of said apparatus complainant paid your orator the sum of three hundred and twenty-five ($325.00) dollars, but failed and refused to execute said notes, has further failed and refused to comply with his said contract, or to pay your orator any further sums of money whereby the whole of said debt became due and at once payable and the complainant became liable to your orator for a balance of seventeen hundred ($1700.00) dollars with interest. But though often requested, complainant has failed and refused and still fails and refuses to pay the same or any part thereof, and still retains and uses said apparatus and other goods.

Seventh. That your orator has a valid and subsisting mortgage lien upon said apparatus and goods hereinbefore described to secure the payment of said balance of seventeen hundred dollars.

Eighth. Wherefore, your orator, to the end that it may obtain relief to which it is justly entitled in the premises, prays the court to grant to it your writ of subpœna directed to the said W. S. Kirby requesting and commanding him to appear herein and answer
37 not under oath, an answer under oath — expressly waived, to the several allegations in this cross-bill contained. Your orator further prays for judgment against said W. S. Kirby in the

sum of seventeen hundred dollars with interest at five per cent. per annum from the first day of April 1901, and for a decree establishing its mortgage lien upon the property hereinbefore described, and for a foreclosure of said mortgage and sale of said property under proper order of the court, and for such other and further relief, preliminary and final as to the court may seem proper and meet and which equity may require and for costs of suit.

AMERICAN SODA FOUNTAIN COMPANY,
By J. W. THOMPSON, *Its Attorney and Counsel.*

THOMPSON & THOMPSON,
Solicitors and Counsel for American Soda Fountain Company, Cross Complainant.

38 EXHIBIT "A."

Salesman George Sturges.

DALLAS, TEXAS, *Oct. 26th*, 1900.

American Soda Fountain Co., Boston, Mass.:

Forward the following described soda water apparatus, and upon receipt of bill of lading or tender of goods I will honor sight draft or other demand for $100 and the balance I promise to pay in monthly sums as follows 36 equal payments beginning April 1st, 1901, interest from Apr. 1st, 1901 with interest at 5 per cent. from date of shipment, with each payment, and for such balance and interest will execute and deliver contract notes of like tenor and form to the one printed on the back of this order, and maturing as above set forth and will execute such other papers as may be necessary under the laws of the State to protect the title of American Soda Fountain Co., against all third parties. I agree to insure said apparatus for $— —, the loss, if any, payable to American Soda Fountain Co., as its interest may appear, and to keep the same insured until all payments are made. The delivery of such apparatus &c., to be conditional upon compliance with the above terms and conditions, and said apparatus to remain the property of American Soda Fountain Co. till paid for.

In case American Soda Fountain Co., is to take any second hand soda water apparatus in exchange, the undersigned warrants it free from all liens, and agree- to put such apparatus in as good condition as possible and pack and ship it as directed by said American Soda Fountain Co.

Description of apparatus? State name of apparatus and varieties of marbles. Also wood and finish of top. Special Versailles onyx & W. & G. top. 1 constant carbonator 220 volts 10 ft. supply to conn. app.:

Size of apparatus. State number syrup faucets and draught

tubes required. 22 syrup faucets, 3 soda draught tubes 4
39 mineral draught tubes. Prices. Apparatus $— — carbonator — generator, — fountains — tumbler washer — tumbler holders — tumblers — marble slabs — pipe — juices. — $2025.

Mineral water name plates (check those wanted)—Kissengen, vichy, seltzer, Pavilion, Congress, Peruvian beer, Ottawa beer, ginger ale, ale, root beer, Spear beer. Syrup name plates (check those wanted)—Lemon, vanilla, sarsaparilla, pineapple orange, ginger, orgeat, strawberry, raspberry ambrosia, coffee cream, tonic, hock, claret, nectar, rose,chocolates, blackberry, Don't Care, maple, wild cherry, catawba, sherbet, wintergreen, bananna, plain, checkerberry, tea.

Length of supply pipe.—Pipe is furnished extending two feet under the counter. If more is wanted the price is fifteen cents per foot. State length of each supply pipe from bottom of apparatus. Also whether a pipe coupling or the fountain clamp joint is required. No. clamps will be furnished with either apparatus or fountain unless specified on order. Necessary clamps will be sent without charge with apparatus when so specified, not exceeding one for each draught. 1–50 ft. supply M. & F. M. f- clamp

— constant carbonator — volts (if alternating current give voltage at point of installation) — cycles, — phases — reliable carbonator — lbs. city water pressurem — liquified gas outfit No —. — No. — generator — fountains. 24 No. j tumbler holders — No — tumblers 24–7 in. spoons — No. — tumbler washer. — tumbler drainer — change stands. 1–1925 pitchers 1–1879 bowls 1–1925 spoon holders — syrup bottles — shakers — trays — crushed fruitbowl — two way cock, — ice shaver — lemon squeezer. 1 base marble slab, — dispensing slab. (Give exact diagram on separate sheet indicating how the edges
40 are to be finished and where apparatus is to be placed. State on paper diagram which is the upper side.

Juices &c. 2 silver lids, 1–1169 straw vase.

Transportation (avoid lines requiring reshipment if possible.

When shipped: Mention the date, (if possible, that delays in transportation may be obviated. Morgan line as soon as possible. Freight and setting up charges to be paid by consignee.

This order cannot be countermanded and this is fully understood by the signer. There are no other conditions or agreements with your salesman except those herein stated, and no claim will be made by me for anything not specified herein.

Name of bank to which papers are to be sent for collection: ——

W. S. KIRBY.

(Write name and send business card.)

References: App. & carb. to be put up in store at price sold.

Exhibit "A."

40½ $——. ——, 190–.

For value received, —— after date —— promise to pay to the order of American Soda Fountain Co. —— dollars with interest at 6 % ——. The consideration of this and other notes is certain soda water apparatus and appurtenances described in contract between —— —— and the said American Soda Fountain Co., bearing date —— and which —— —— have received of said American Soda Fountain Co.

Nevertheless it is understood and agreed by and between —— —— and the said American Soda Fountain Co., that the title to the above mentioned property does not pass to —— —— and that until all said notes are paid the title to the aforesaid property shall remain in the said American Soda Fountain Co. which shall have the right, in case of non-payment at maturity of either of said notes without process of law, to enter and retake, and may enter and retake immediate possession of the said property, wherever it may be, and remove the same.

Payable at the —— bank.

Due ——.

—— ——.

41 STATE OF TEXAS, }
County of Dallas. }

Before me D. W. Bowser, a notary public within and for the county of Dallas, State of Texas, on this day personally appeared George Sturges, who being by me duly sworn, says on oath; My name is George Sturges, I am the George Sturges referred to in the above and foregoing cross-complaint made by American Soda Fountain Company, and I am and was on the 20th day of October 1900, the representative and salesman for The American Soda Fountain Company, cross-complainant, and made the sale referred to in said cross-complaint and know all the terms stipulations and conditions thereof. I have read the foregoing cross-complaint and know the contents thereof and the same is true of my own knowledge, excepting as to matters stated on information and belief, and as to those, I believe them to be true.

I make this affidavit because I have a personal knowledge of all the facts and because the American Soda Fountain Company is a citizen and an inhabitant of the State of Massachusetts and is out of this district and the State of Texas.

GEO. STURGES.

Sworn to and subscribed before me by George Sturges, this 12 day of May A. D. 1902.

D. W. BOWSER,

[SEAL.] *Notary Public, Dallas County, Texas.*

Endorsed as follows: In the circuit court of the United States fifth circuit and northern district of Texas at Dallas. No. 567 In equity. W. S. Kirby *vs.* American Soda Fountain Company. Demurrer answer and cross-complaint of American Soda Fountain Company. Filed 12 day of May 1902. J. H. Finks, clerk, by W. A. Porter, deputy. Thompson & Thompson solicitors and counsel for American Soda Fountain Company.

41½ In the United States Circuit Court for the Northern District of Texas, at Dallas.

The President of the United States of America to W. S. Kirby, Dallas county, Greeting:

You are hereby commanded to appear personally before the honorable circuit court of the United States for the northern district of Texas, in the fifth circuit, at a court to be holden at the city of Dallas in and for said circuit, on the first Monday of June next, or whensoever the said court shall be there to answer a cross bill exhibited against W. S. Kirby by American Soda Fountain Company, and to do further and receive what the said court shall have considered in that behalf. And this that you are not to omit under the penalty of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of [SEAL.] the circuit court of the United States for the northern district of Texas, at the city of Dallas, this 13th day of May, 1902, and of the Independence of the United States of America, the 126 year.

J. H. FINKS,
Clerk U. S. Circuit Court, Northern District of Texas,
By —— ——, *Deputy.*

The defendant W. S. Kirby is required to enter an appearance in the above suit, in the clerk's office, on or before the first Monday of June next, otherwise the bill will be taken as confessed.

J. H. FINKS, *Clerk,*
By W. A. PORTER, *Deputy.*

[Endorsed:] Original. No. 567 Eq. Chancery. In the U. S. circuit court, Dallas Texas. W. S. Kirby *vs.* American Soda Fountain Company. Subpœna in chancery. Issued May 13th 1902, Returnable June rules, 1902 J. H. Finks, clerk. By W. A. Porter, deputy. Returned and filed 19 day of May 1902 J. H. Finks, clerk. By W. A. Porter, deputy. To W. S. Kirby, Dallas county.

Marshal's Return.

Received this writ on the 13th day of May 1902, and I executed the same on the 19th day of May, 1902, by delivering to the within named defendant W. S. Kirby, in person a true copy of this writ.

GEO. H. GREEN,
U. S. Marshal, N. D. T.,
By R. M. WARDEN, *Deputy.*

Fee	$2.00
Mileage or actual expenses car fare	10
Total	$2.10

42 *Motion to Transfer to Law Docket.*

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN CO. } No. 567.

Now comes plaintiff and moves the court to transfer this cause to the law docket because the plaintiff's cause of action sounds in damages and is cognizant at law.

McCORMICK & SPENCE,
Att'ys for Plaintiff.

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* Amr. Soda F. Co. Motion to transfer to law docket. Filed June 20 1902. J. H. Finks clerk.

Order Dismissing Original Bill.

W. S. KIRBY
vs.
AMR. SODA FOUNTAIN CO. } No. 567. In Equity.

JUNE 20TH, 1902.

Complainant coming and asking that the original bill of complaint be dismissed without prejudice and it appearing to the court that said request should be granted. It is therefore ordered that the original bill of complaint herein be and the same is hereby dismissed without prejudice to the right of the plaintiff to proceed further on the cause of action set forth in said bill hereafter as he may be advised,

It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant for which execution may issue.

June 20th 1902.

EDWARD R. MEEK, *Dist. Judge.*

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* Amr. Soda Fountain Co. Order dismissing orig. bill. Filed June 20th, 1902. J. H. Finks, clerk.

43 *Plea.*

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567.

The plea of W. S. Kirby, defendant in the cross bill, to the cross bill of American Soda Fountain Company, defendant in the original bill.

This defendant in cross bill by protestation, not confessing or acknowledging all or any of the matters and things in the cross bill of complaint mentioned and contained to be true in such sort, manner and form as the same are therein set forth and alleged for plea to the whole of said cross bill, says that the original bill, or petition, filed by said W. S. Kirby in the district court of Dallas county, Texas and removed into this honorable court, has been by the said W. S. Kirby dismissed. And the cross bill above mentioned, is not within the jurisdiction of this honorable court, because the amount in dispute under the allegations of said cross bill do- not exceed, exclusive of interest and costs, the sum or value of two thousand dollars; for that the plaintiff in said cross bill seeks therein for a recovery against the defendant in said cross bill of a sum less than two thousand dollars exclusive of interest and costs, which said sum not including interest and costs, sought to be recovered in said cross bill is the sum of $1700.00 only, which is the only matter or amount in dispute in said cross bill.

All matters and things this defendant in the cross bill doth aver to be true, and he pleads the said matters and want of jurisdiction to the said cross bill as a whole, and prays the judgment of this honorable court whether he should be compelled to make any other or further answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

McCORMICK & SPENCE,
Counsel for W. S. Kirby, Defendant in the Cross Bill.

44 STATE OF TEXAS, }
County of Dallas. }

W. S. Kirby makes solemn oath, and says that he is the defendant in the cross bill in the above numbered and entitled suit, and that

the foregoing plea is not interposed for delay and that the same is true in point of fact.

W. S. KIRBY.

Sworn to and subscribed before me, this 24th day of July A. D. 1902 by the said W. S. Kirby, as witness my hand and official seal on the day last before written.

EDWARD M. BROWDER,
[SEAL.] *Notary Public in and for Dallas County, Texas.*

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

J. M. McCORMICK,
Counsel for W. S. Kirby, Defendant in the Cross Bill.

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* American Soda Fountain Company. Plea of W. S. Kirby to the cross bill exhibited against him by American Soda Fountain Company. Filed 24th day of July 1902. J. H. Finks, clerk. By C. B. Hollarn, deputy.

Request to Have Plea Set Down.

Request to have plaintiff's plea to jurisdiction set down for argument.

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567. In Equity.

To the honorable judges of said court:

Now comes American Soda Fountain Company defendant,
45 and respectfully asks the court that the plaintiff's plea to the cross bill of the defendant filed herein July 24th, 1902, be set down for argument at the next rule day of these honorable courts:

AMERICAN SODA FOUNTAIN COMPANY,
By THOMPSON & THOMPSON,
Solicitors for Defendant.

J. W. THOMPSON, *Of Counsel.*

Endorsed as follows: No. 567 Eq. W. S. Kirby *vs.* American Soda Fountain Company. Request to have plaintiff's plea to jurisdiction set down for argument. Filed 14th day of Aug., 1902. J. H. Finks, clerk, by C. B. Hollarn, deputy. Thompson & Thompson, att'ys for defendant.

Order.

In U. S. Circuit Court, 5th Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY.

THE 5TH DAY OF FEBRUARY, A. D. 1903.

This day the plea of the plaintiff to the jurisdiction of this court to hear and determine the matters now in controversy between the parties coming on to be heard came the plaintiff W. S. Kirby *plaintiff* and the defendant American Soda Fountain Co. by their attorneys and submit said plea to the courts and the same being considered the court is of opinion that said plea is not well taken and the same is overruled to which action of the court the plaintiff in open court excepts and upon application of plaintiff he is given until the rule day in April to answer defendant's cross-bill.

EDWARD R. MEEK, *Judge.*

Endorsed: No. 567. Eq. W. S. Kirby vs. American Soda Fountain Co. Order. Filed Feb'y 5th, 1903. J. H. Finks, clerk.

46 *Judgment Pro-Confesso.*

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567. In Equity.

It appearing that the subpœna issued on the defendant's cross complaint against the complainant, W. S. Kirby, was duly and regularly served upon said W. S. Kirby on the 19th day of May 1902, by delivering to W. S. Kirby, complainant in person at Dallas, Texas, in said district, an attested copy of said subpœna, and it further appearing that afterwards, to-wit on July 24th 1902 the said W. S. Kirby complainant, filed his plea to the jurisdiction of this court to hear and determine matters set up in said cross bill. And it further appearing that on the 5 day of February 1903, said plea was, by the court overruled, and the said complainant W. S. Kirby, allowed until the rule day in April to answer said cross complaint of the defendants. And it appears that the said W. S. Kirby has

not further appeared and has not filed any further plea, demurrer or answer in said cause.

Now therefore, on motion of Thompson & Thompson, solicitors for the defendant American Soda Fountain Company, it is ordered that the cross complainant in said cause, be taken *pro confesso* as to said complainant, W. S. Kirby, in accordance with the rules in said cases made and provided.

THOMPSON & THOMPSON,
Solicitors for Defendant, American Soda Fountain Company.

This the 21st day of April A. D. 1903.

Endorsed as follows: No. 567. Eq. W. S. Kirby *vs.* American Soda Fountain Co. Judgment *pro confesso*. Filed 21 day of April 1903, J. H. Finks, clerk by C. B. Hollarn, deputy.

47 *Decree.*

In the Circuit Court of the United States, Fifth Circuit and Northern District of Texas, at Dallas, May, Term A. D. 1903.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. 567. In Equity.

WEDNESDAY, *The 27th Day of May, A. D.* 1903.

It appearing to the court that heretofore towit on the 12th day of May, 1903, the defendant American Soda Fountain Company, filed in this court and in the above entitled cause, its cross complaint against W. S. Kirby, complainant, to the bill filed against it in this court by the said complainant W. S. Kirby asking for cancellation of written contract for the payment of $2025, and for $2500., damages; that on the 13th day of May 1902, a subpœna was issued out of this court on said cross complaint and was duly and regularly served on the said W. S. Kirby, complainant, on the 12th day of May 1902, by delivering to said W. S. Kirby, complainant in person at Dallas, Texas, in said district, an attested copy of said subpœna.

It further appearing that afterwards to-wit on June 20th 1902 the said W. S. Kirby complainant appeared in open court and dismissed his said bill and suit against the defendant American Soda Fountain Company; that afterwards to-wit on the 24th day of July, 1902, the said W. S. Kirby, complainant, filed his plea to the jurisdiction of this court, to hear and determine the matters and things alleged against him in said cross complaint, which said plea to the jurisdiction of the court, was afterwards to-wit on the 5th day of February, 1903, considered by the court, and was on said 5th day of February overruled by this court and said cause retained for

trial on defendant's said cross complaint against the said W. S. Kirby and the said W. S. Kirby was, by order of the court,
48 allowed until the rule day in April 1903, the same being the 6th day of April, 1903, to answer the said cross complaint of the defendant.

And it further appearing that the said W. S. Kirby, complainant did not further appear, and has not filed any further plea, demurrer or answer in said cause, and that an order taking said cross complaint *pro confesso* was duly entered on the 21st day of April, 1903, in the order book, and that no proceedings have been had or taken by the said complainant since said order was so entered.

And it appearing that more than thirty days have elapsed after entering said order, as aforesaid to-wit on the 21st day of April 1903; and the complainant still failing to further appear, plead, demur or answer to said cross complaint, upon application of defendant duly made, the court, on consideration of the premises, does order and decree that said cross complaint be taken for confessed; and it appearing that the allegations in said cross complaint and the exhibits thereto, are true, and that the said W. S. Kirby is justly and truly indebted to the said American Soda Fountain Company, defendant in the sum of $1700, with interest thereon, at the rate of 5% per annum, from the 1st day of April 1901, said principal and interest amounting to the total sum of $1883.29.

It further appearing to the court that a valid mortgage lien existed on April 1st, 1901, and does now exist in favor of the American Soda Fountain Company against the said W. S. Kirby to secure the payment of said sum of $1883.29 upon the following described personal property, now in possession of the said W. S. Kirby at his store in Dallas, Dallas county, Texas viz:

1 special Versailles onyx soda fountain apparatus W. & G. (white and gold) top.
1 marble base slab,
2 dozen J. tumbler holders,
49 2 dozen bar spoons, 7 inches,
1 No. 1925 spoon holder,
1 No. 1169 straw vase,
1 No. 1879 sugar bowl,
2 silver lids,
1 50 ft. B. T. supply pipe
1 No. 1925 2 quart cream pitcher,

It is therefore considered, ordered, adjudged and decreed by the court that the defendant, American Soda Fountain Company do have and recover of the complainant, W. S. Kirby, said sum of $1883.29, together with interest thereon from the date of this decree, at the rate of 5 % per annum, together with its costs in this behalf expended.

It is further ordered, adjudged and decreed that the said mortgage lien, as it existed on April 1st, 1901 in favor of the American

Soda Fountain Company upon the property hereinbefore described, be and the same is now here foreclosed.

It is further ordered, adjudged and decreed that upon complainant, W. S. Kirby's paying to The American Soda Fountain Company, defendant, said sum of $1883.29 with interest and all costs within sixty days from the date of this judgment, the said payment shall be in full of this judgment and decree and in satisfaction of said mortgage lien upon said above mentioned property which property shall thereby be released to the said W. S. Kirby.

And it is further adjudged and decreed that in default of such payment by the said W. S. Kirby, or by some one on his behalf, all of said above described property, or so much of the same as shall be sufficient to raise the amount due defendant for principal, interest and costs in this case, shall be sold at public auction for cash by or under the direction of George H. Green Esq., who is hereby appointed special commissioner for the purpose of making said
50 sale, that said sale be made in Dallas county, Texas, where said mortgage property is situated; that said commissioner shall give public notice of the time and place of such sale, according to the course and practice of this court; that the commissioner execute a bill of sale to the purchaser of said mortgage property on the said sale, and that the said master pay to the defendant American Soda Fountain Company or its solicitor out of the proceeds of said sale, the said sum of $1883.29 with interest and the costs in this suit to be taxed, or so much as the purchase money of the mortgage property will pay of the same; and that the said master bring the surplus money received from the said sale, if any there be, into court without delay to abide the further orders of this court.

It is further ordered, adjudged and decreed that should said above named property at said commissioner's sale fail to bring the said sum of $1883.29 with interest and costs, then the said American Soda Fountain Company shall have execution against the said W. S. Kirby for said difference, for all of which let execution issue.

EDWARD R. MEEK, *Judge.*

Endorsed as follows: No. 567 Eq. Decree. Filed May 27, 1903. J. H. Finks, clerk.

51 *Petition for Appeal.*

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. —.

Your petitioner, W. S. Kirby, respectfully represents that there is manifest error committed to the injury of the petitioner by the

final decree pronounced in this cause on the 27th day of May, 1903, and by the interlocutory order and decree overruling the petitioner's plea to the jurisdiction to the court over petitioner as the defendant in the cross bill filed by the American Soda Fountain Company in the above cause, which said plea to the jurisdiction called to the court's attention the fact that the amount in controversy in said cross bill was less than the sum or value of two thousand dollars, and that the original bill in the cause had been dismissed by the complainant therein, with the consent of the court without prejudice at a former term of the court. That said plea to the jurisdiction was overruled, and your petitioner failed to file further defenses to the cross bill and final decree was entered in favor of the complainant in the cross bill against your petitioner, on the 27th day of May, 1903, for the sum of $1833.39.

Wherefore, petitioner, W. S. Kirby, considering himself aggrieved prays an order granting an appeal from the said final decree and interlocutory order overruling his plea to the jurisdiction to the Supreme Court of the United States, as authorized by section V of the act of Congress of the United States approved March 3, 1891. And petitioner herewith files his bond in the penal sum of $2500.00,

52 which bond is approved by the Honorable Edward R. Meek, one of the judges of this court.

J. M. McCORMICK,
WENDEL SPENCE,
Solicitors for Petitioner, W. S. Kirby.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by W. S. Kirby it is ordered that said appeal be granted, bond therefor in the penal sum of $2500.00 having been executed and approved by the court, and that a supersedeas be granted.

This appeal is granted solely upon the question of jurisdiction which, as set forth in the foregoing petition for appeal is certified to the Supreme Court of the United States, and in order that the Supreme Court may properly determine the question of jurisdiction (no other question having been tried in the circuit court), it is ordered that a transcript of the record, proceedings and papers upon which the decree was made, duly authenticated, be sent to the Supreme Court of the United States.

Dated, this 8th day of June, A. D. 1903, and during the term at which said decree was entered.

EDWARD R. MEEK,
District Judge.

Endorsed as follows: No. 567 Equity. W. S. Kirby *vs.* The American Soda Fountain Company. Petition for allowance of appeal. Filed 10 day of June 1903. J. H. Finks, clerk by C. B. Hollarn, deputy.

53 *Assignment of Error.*

In the Circuit Court of the United States for the Northern District of Texas. In Equity.

W. S. KIRBY
vs.
THE AMERICAN SODA FOUNTAIN COMPANY. } No. —.

Assignment of errors.

And now on the 8th day of June, 1903, came the plaintiff by J. M. McCormick and Wendel Spence, his solicitors, and says that the decree in said cause is erroneous and against the just rights of said plaintiff, for the following reasons:

1. Because the court had no jurisdiction to render the decree on the cross bill (after the original bill had been dismissed with leave of the court without prejudice) for the lack of jurisdictional amount in controversy.

2. Because the court should have sustained the plaintiff's plea to the jurisdiction interposed against the cross bill and dismissed the cross bill.

Wherefore, the said plaintiff prays that the said decree be reversed, and that the said court may be directed to enter a decree dismissing the cross bill for want of jurisdiction.

J. M. McCORMICK,
WENDEL SPENCE,
Solicitors for Plaintiff.

Endorsed as follows: No. 567 Equity. W. S. Kirby *vs.* The American Soda Fountain Company. Assignment of errors. Filed 10 day of June 1903. J. H. Finks, clerk. By C. B. Hollarn, deputy.

54 *Bond.*

W. S. KIRBY
vs.
AMERICAN SODA FOUNTAIN COMPANY. } No. —. In Equity.

Know all men by these presents: That we, W. S. Kirby as principal, and the other subscribers as sureties, are held and firmly bound unto the said American Soda Fountain Company a corporation in the full and just sum of $2500.00 to be paid to said American Soda Fountain Company, its attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and firmly by these presents.

Sealed with our seals, and dated this 5th day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, the above named W. S. Kirby, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the judge of the circuit court of the United States for the northern district of Texas:

Now, therefore, the condition of this obligation is such that if the above named W. S. Kirby shall prosecute said appeal to effect and pay all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Witness our hands and seals on the day last before written.

W. S. KIRBY.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,

By E. M. REARDON,

Resident Vice-President.

J. S. GROCE,

Resident Assistant Secretary.

Approved as an appeal bond by me, this 8th day of June A. D. 1903,

EDWARD R. MEEK,

District Judge.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

55 "The regular quarterly meeting of the board of trustees of the American Surety Company of New York, was held at the company's office, No. 100 Broadway, in the city of New York, on Wednesday, January 16, 1901, at 12 o'clock noon.

"Mr. Wheelock called the meeting to order.

"On motion of Mr. Wheelock, Cornelius N. Bliss was elected chairman.

"On motion, David B. Sickels was elected secretary.

"The secretary read the report of the nominating committee as follows:

"To the board of trustees of the American Surety Company of New York.

"GENTLEMEN: The committee appointed by the executive committee of this company at their meeting held Wednesday December 12, 1900, for the purpose of nominating officers of the company. * * * for the ensuing year; beg leave to report as follows:

We nominate for resident vice presidents at Dallas, Texas;
John N. Simpson,
Edwin M. Reardon,
J. T. Trezevant,
Sam P. Cochran,
Resident assistant secretaries at Dallas, Texas:
J. S. Groce,
Frank Reeves.

* * * * * * *

"On motion of John N. McCook, the secretary was authorized to cast one ballot on behalf of the trustees present, and the aforementioned officers * * *, as recommended by the nominating committee, were declared to have been unanimously elected to their respective offices for the ensuing year." "The following resolution was adopted: "Resolved, that the resident vice-presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and attach the seal of the
56 company to any and all obligations for or on behalf of the company, such obligations, however, to be attested in every instance by the resident assistant secretary."

STATE OF NEW YORK, }
County of New York, } ss:

I, Henry Tofts, assistant secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the record book of the board of trustees of the American Surety Company of New York, with the original record of said board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 25th day of January, 1901.

HENRY TOFTS,
Assistant Secretary.

[SEAL.]

Endorsed: No. 567 Eq. W. S. Kirby *vs.* American Soda Fountain Company. Supersedeas appeal bond. Filed 10th day of June 1903, J. H. Finks, clerk By C. B. Hollarn, deputy.

57 UNITED STATES OF AMERICA, *ss:*

The President of the United States to American Soda Fountain Company and J. W. Thompson, its solicitor of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at Washington in the District of Columbia, within thirty days from the date of this writ, pursuant to an order of appeal filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein W. S. Kirby is appellant and American Soda Fountain Company is appellee, to show cause, if any there be, why the decree in said order of appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of June, A. D. 1903, and of the Independence of the United States the 127th year.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas. }

EDWARD R. MEEK,
United States District Judge.

Service of the above is accepted this 30th day of June, 1903.

AMERICAN SODA FOUNTAIN COMPANY,
By J. W. THOMPSON,
Its Solicitor of Record.
J. W. THOMPSON.

[Endorsed:] Original. No. 567. Eq. W. S. Kirby *vs.* American Soda Fountain Company. Citation. Filed 10 day of June, 1903, at — o'clock —. m. J. H. Finks, clerk, by C. B. Hollarn, deputy.

58 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, assignment of errors and all the proceedings in cause No. 567, in equity, wherein W. S. Kirby is complainant and The American Soda Fountain Company is respondent, except the original citation in error is included therein instead of a copy thereof, as fully as the same remains on file and of record in my office at Dallas, Texas.

Witness, my hand officially and the seal of said court at Dallas, Texas, this the 2nd day of July A. D. 1903.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas. }

J. H. FINKS, *Clerk*,
By C. B. HOLLARN, *Deputy*.

Endorsed on cover: File No. 19,008. N. Texas C. C. U. S. Term No. 357. W. S. Kirby, appellant, *vs.* American Soda Fountain Company. Filed July 14th, 1903.

United States Supreme Court,

OCTOBER TERM, 1903.

No. 357.

W. S. KIRBY, APPELLANT,
vs.
AMERICAN SODA FOUNTAIN COMPANY.

Appeal from the United States Circuit Court for the Northern District of Texas.

I.

The answer of appellant to the motion to dismiss the appeal.

The jurisdiction of this court is granted by the fifth section of the Judiciary Act approved March 3, 1891. So much of said section as affects the jurisdiction of this court of this appeal, follows:

"Sec. 5. That appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

The question of the jurisdiction of the Circuit Court was in issue and was certified to the Supreme Court from the court below for decision, as will appear from the Petition for appeal, and the Order allowing the appeal, which Petition for appeal and order allowing the appeal follow:

"Your petitioner, W. S. Kirby, respectfully represents that there is manifest error committed to the injury of the petitioner by the final decree pronounced in this cause on the 27th

day of May, 1903, and by the interlocutory order and decree overruling the petitioner's plea to the jurisdiction to the court over petitioner as the defendant in the cross bill filed by the American Soda Fountain Company in the above cause, which said plea to the jurisdiction called to the court's attention the fact that the amount in controversy in said cross bill was less than the sum or value of two thousand dollars, and that the original bill in the cause had been dismissed by the complainant therein, with the consent of the court without prejudice at a former term of the court. That said plea to the jurisdiction was overruled, and your petitioner failed to file further defenses to the cross bill and final decree was entered in favor of the complainant in the cross bill against your petitioner, on the 27th day of May, 1903, for the sum of $1,833.39.

Wherefore, petitioner, W. S. Kirby, considering himself aggrieved, prays an order granting an appeal from the said final decree and interlocutory order overruling his plea to the jurisdiction to the Supreme Court of the United States, as authorized by section V of the act of Congress of the United States approved March 3, 1891. And petitioner herewith files his bond in the penal sum of $2,500.00, which bond is approved by the Honorable Edward R. Meek, one of the judges of this court.

J. M. McCORMICK,
WENDEL SPENCE,
Solicitors for Petitioner, W. S. Kirby.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by W. S. Kirby, it is ordered that said appeal be granted, bond therefor in the penal sum of $2,500.00 having been executed and approved by the court, and that a supersedeas be granted.

This appeal is granted solely upon the question of jurisdiction which, as set forth in the foregoing petition for appeal, is certified to the Supreme Court of the United States, and in order that the Supreme Court may properly determine the question of jurisdiction (no other question having been tried in the Circuit Court), it is ordered that a transcript of the record, proceedings and papers upon which the decree was made,

duly authenticated, be sent to the Supreme Court of the United States.

Dated, this 8th day of June. A. D. 1903, and during the term at which said decree was entered.

EDWARD R. MEEK,
District Judge."

The only question put in the issue in the court below, was the jurisdiction of the Circuit Court over the controversy in the cross bill, and this question, as above shown, has been certified. It would seem that the jurisdiction of this court to entertain the appeal is obvious, and that the motion to dismiss is void of merit, even of color.

II.

Touching the jurisdiction of the Circuit Court to proceed on the cross bill after the dismissal of appellant's bill, the question for determination, is the jurisdictional competency of a Circuit Court of the United States to proceed with a cross bill asking affirmative relief after the dismissal of all other bills where the amount in controversy in the cross bill does not exceed, exclusive of interest and costs, the sum or value of two thousand dollars, there being no fund or property in the possession of the court. This question arises in the record in this way:

The appellant sued the appellee in the State Court on May 16, 1901, for fifteen hundred dollars for deceit (Record, pages 1 and 2.) Citation issued on May 18, 1901, requiring defendant to answer on the second Monday in September, 1901, (Record, page 3.) Defendant answered September 9, 1901, (Record, page 4.) Appellant filed first amended original petition on December 12, 1901, increasing his claim for damages to twenty-five hundred dollars, and prayed for cancellation of an obligation held by defendant, given at the time the alleged deceit was practiced (Record, pages 5, 6, 7, 8 and 9.) On January 22, 1902, the defendant filed its application and bond for removal to the United States Circuit Court (Record, pages 9, 10 and 11.) The Order for removal was granted on February

3, 1902 (Record, page 12.) The Transcript was duly filed in the Circuit Court May 11, 1902 (Record, page 13), and on the same day the defendant filed in the Circuit Court its demurrer, answer and cross complaint, in which cross complaint, or cross bill, the defendant (appellee here) prayed a recovery against the appellant for seventeen hundred dollars, with interest and foreclosure of a mortgage lien upon certain personal property (Record, pages 13 to 30.) On May 13, 1902, subpœna issued on the cross bill (Record, page 30) which was served on appellant on May 19, 1902 (Record, page 31.) On June 20, 1902, appellant filed his motion to have the cause which had been docketed as an equity case, transferred to the law docket (Record, page 31); and on June 20, 1902, the court below made an order as follows:

"Complainant coming and asking that the original bill of complaint be dismissed without prejudice, and it appearing to the Court that said request should be granted. It is therefore ordered that the original bill of complaint herein, be and the same is hereby dismissed without prejudice to the right of the complainant to proceed further on the cause of action set forth in said bill hereafter as he may be advised.

It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant, for which execution may issue. (Record, page 31.)"

On July 24, 1902, the appellant filed his plea to the cross bill, in which he alleged that the cross bill was not within the jurisdiction of the Circuit Court, because the amount in dispute under the allegations did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars, and that the amount sought to be recovered, exclusive of interest and costs, was the sum of seventeen hundred dollars, which was the only matter or amount in dispute in said cross bill (Record, page 32.) On August 14, 1902, the plea was set down for a hearing by the appellee (Record, page 33), and on the 5th day of February, 1903, the Court overruled the plea; to which action appellant excepted (Record, page 34.) Judgment *pro confesso* was taken on the first day of April, 1903 (Record,

pages 34 and 35), and final decree was rendered on May 27, 1903, in favor of appellee for seventeen hundred dollars, with interest, and for foreclosure on the mortgaged property (Record, pages 35, 36, 37.)

The errors assigned are:

1. Because the court had no jurisdiction to render the decree on the cross bill (after the original bill had been dismissed with leave of the court without prejudice) for the lack of jurisdictional amount in controversy.

2. Because the court should have sustained the plaintiff's plea to the jurisdiction interposed against the cross bill and dismissed the cross bill. (Record, page 39.)

III.

The original bill and the cross bill constitute one suit when the cross bill prays no affirmative relief, or depends on the original bill for jurisdiction. In such cases the cross bill cannot stand as an original bill, and the dismissal of the original bill disposes of cross bill. The appellant contends that the cross bill in this record was dependent, and that the dismissal of the original bill *ipso facto* disposed of the cross bill. Or that if the dismissal of the original bill did not dismiss the cross bill also, it nevertheless left the cross bill subject to any attack which might have been made on it if filed as an original bill. That after the appellant's bill was dismissed, the cross bill could not depend on it for jurisdiction, and at most, could only be proceeded on in the same manner as if it had been filed as an original bill. Tested as an original bill, the cross bill lacked an essential jurisdictional element; there was not a sufficient amount in controversy. If the dismissal of the appellant's bill left the cross bill "for disposition in the same manner as if it had been filed as an original bill," then clearly the cross bill should have been dismissed by the Circuit Court, because had the cross bill been filed as an original bill, it would necessarily have been so dismissed.

It is only material to enquire whether the Circuit Court might not have declined to permit the dismissal by appellant of his bill, had this dismissal been resisted by the cross complainant, for the purpose of discovering that there is a rule in such cases. The very existence of this rule vesting discretion in the Court as to allowing the dismissal of an original bill where its exercise would be oppressive to a cross complainant, illustrates the force of such order when made. The order of dismissal in this record was not resisted, and was never vacated

Cases can be found where the original bill has been dismissed and the cross bill retained, but in no such case, so far as a diligent research has disclosed, has it appeared that the amount in controversy in the cross bill was insufficient to have supported the jurisdiction of the trial court had the cross bill been filed as an original bill; nor where the cross bill lacked any necessary averment of an original bill.

It may be that if the objection to the jurisdiction of the court over the person of the defendant in a cross bill were interposed after the dismissal of an orignal bill, this personal privilege should be held to have been waived by the institution of the original suit. No such question, however, arises in this record. The jurisdictional defect in the cross bill is one that cannot be waived. Consent cannot confer on a Circuit Court of the United States competency to adjudicate a controversy involving less than the minimum amount justiciable there.

The following cases are thought to bear on the question under discussion:

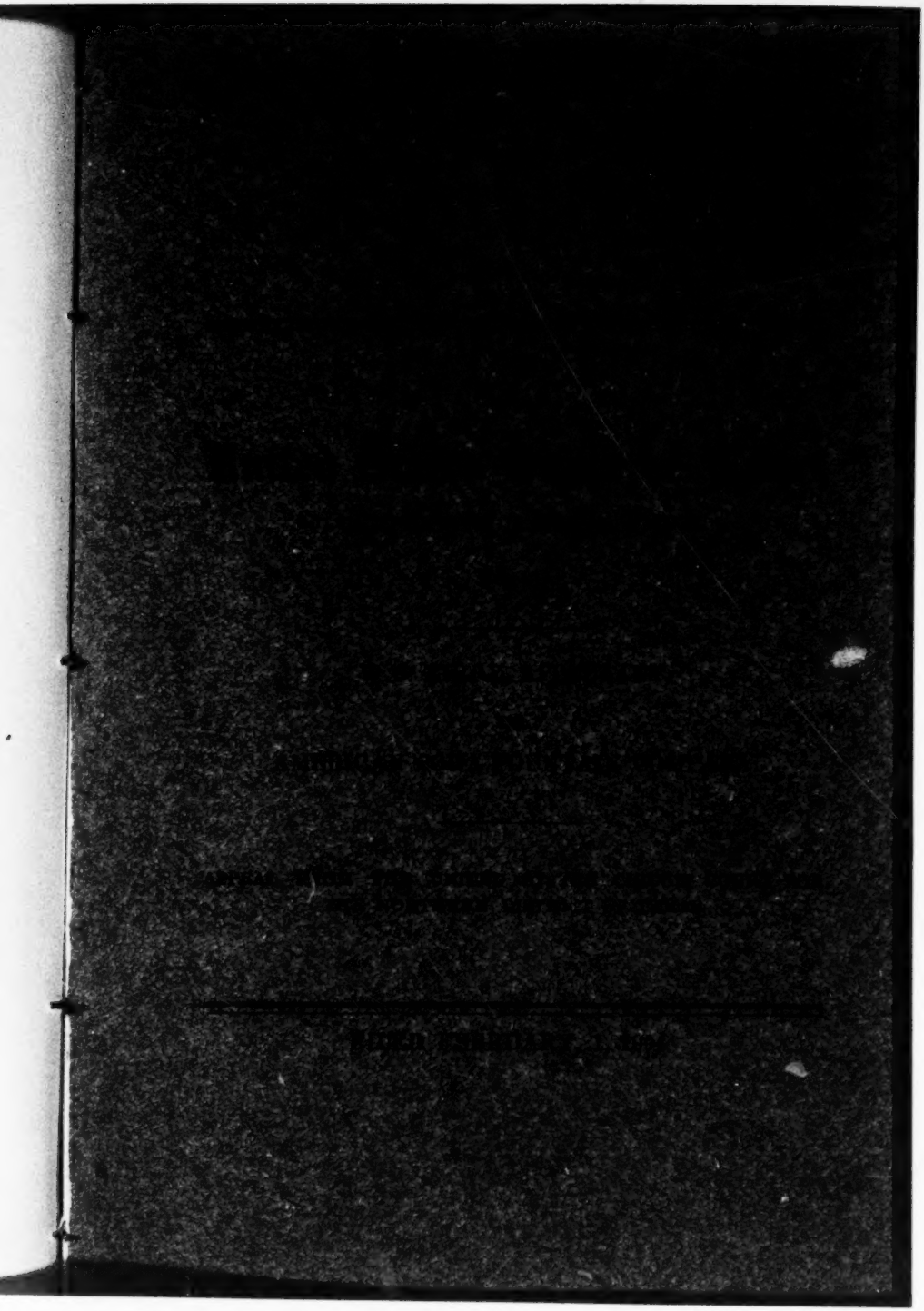
C. and A. R. R. Co. v. Union Rolling Mill Co., 109 U. S., pp. 713 to 719.
Pullman Palace Car Co. v. Cent. Trans. Co., 171 U. S., p. 146 et seq.
San Diego Flume Co. v. Souther, 90 Fed., p. 167.
Cabaniss v. Reco Min. Co., 116 Fed., p. 323.
City of Detroit v. Detroit City Ry. Co., 55 Fed., pp. 571 to 575.
Small v. Peters, 104 Fed., pp. 402 to 404.
Electric Accum. v. Brush Elec. Co., 44 Fed., p. 603.

IV.

It is respectfully submitted that the motion to dismiss should be denied, and if this court finds color in the record to support the motion to dismiss, that the motion to affirm be denied, and that the decree of the lower court be reversed with instructions to dismiss the cross bill.

Joseph H McCormick

Solicitor for W. S. Kirby, Appellant.



United States Supreme Court

OCTOBER TERM, 1903

No. 357

W. S. KIRBY, APPELLANT,

vs.

AMERICAN SODA FOUNTAIN COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS

I

MOTION BY APPELLEE TO DISMISS APPEAL ALLOWED FROM THE DECREE OF SAID CIRCUIT COURT, ENTERED IN SAID CAUSE ON THE TWENTY-SEVENTH DAY OF MAY, 1903, AND TO AFFIRM SAID DECREE.

And now comes the appellee by John J. Weed, its attorney, and moves the Court to dismiss said appeal, and affirm said decree, because, and for the reason, that the value of the amount in dispute in said cause, is not within the appellate jurisdiction of this court; and to affirm said decree for the reason that it is manifest from the record that this appeal was taken for delay only; and that the question on which the jurisdiction of this court depends, is so frivolous as not to require further argument.

II.

Statement of Facts Shown by the Record

The plaintiff, and appellant, on the 16th day of May, 1901, filed his petition against the defendant in the 14th Judicial District Court of Dallas county in the state of Texas, in which he averred that on the twenty-sixth day of October, 1900, he was the owner of a certain soda fountain apparatus of the value of five thousand dollars; and that on said date, the defendants represented to the plaintiff, that it had a certain soda fountain, at some distant point, but which was not then exhibited to the defendant, which was excellently constructed, and of very superior style and appearance; of good workmanship and material, and superior in style, appearance and value to the said soda fountain apparatus owned by the plaintiff.

That the plaintiff relying on the representations of the defendant, delivered his soda fountain to the defendant; and that the said soda fountain delivered by the defendant to the plaintiff, was not of the same description or value of the soda fountain which the plaintiff delivered to the defendant; but was of less value than the one delivered by the defendant to the plaintiff in the sum of fifteen hundred dollars; and that by reason of the promises and the breach by the defendant of its agreement to deliver such a soda fountain apparatus as it contracted, the plaintiff has been damaged in the sum of fifteen hundred dollars.

Record pages 1 and 2.

Second. That citation was issued in said cause on the eighteenth and served on the defendant on the twentieth of May, 1901.

Record pages 4 and 5.

Third. That at the term of said court, held thereafter, and in September, 1902, the defendant filed a demurrer to the plaintiff's original petition, and also a denial of each and every allegation thereof.

Record page 4.

Fourth. On the twelfth day of December, 1901, the plaintiff filed by leave of the court, his first amended original petition, and sets out more fully and in detail the agreement between the plaintiff and defendant for the sale of said soda fountain; and avers "that by reason of the exchange effected through the fraudulent and deceitful conduct of the defendant, and on account of the inferior apparatus furnished by the defendant to the plaintiff, the defendant, has become liable, and promised to pay to the plaintiff the sum of two thousand five hundred dollars; and that though payment thereof has been demanded by the plaintiff, of the defendant, the defendant has wholly failed to pay the same, or any part thereof, to the damage of the plaintiff, of the said sum of two thousand five hundred dollars; and that the obligation of the plaintiff to pay the defendant the sum of two thousand and twenty-five dollars' as difference according to said contract be cancelled, and that the plaintiff have and recover of and from the defendant the sum of two thousand five hundred dollars, and costs, and such other and further relief as he may be entitled to in the premises.

Record pages 5, 6, 7, 8, 9.

Fifth. On the twenty-second day of January, 1902, the defendant filed its petition for the removal of said cause from the state court, in which the same was pending, being the 14th Judicial District Court of Dallas county, Texas, to the circuit court of the United States for the northern district of Texas, upon the ground and for the reason that the amount claimed by the plaintiff was two thousand five hundred dollars; and that the controversy in said suit, is, and was at the commencement thereof, wholly between citizens of different states; and the defendant was, at the date of commencement of this suit, and still is an inhabitant and citizen of the state of New Jersey, and a non-resident of the state of Texas; and that the plaintiff was, and still is a citizen of the county of Dallas, and state of Texas.

Record pages 9 and 10.

Sixth. The defendant having executed its bond for costs of removal, the petition for the removal thereof was granted; and the clerk of the district court of Dallas county, Texas, was ordered to make out a transcript of the record in said cause, to be filed in the circuit court of the United States, for said Northern district of Texas, and this was done.

Record pages 11 and 12.

Seventh. The defendant, on the twelfth of May, 1902, filed in said cause, its demurrer, answer and cross-complaint to the original, and amended petition filed by the plaintiff; and in said pleadings, objections are made to the plaintiff's original and amended petition, and a denial of all the material allegations of each of said petitions are made under oath; and in the cross-complaint filed by the defendant, the terms and stipulations of the contracts between the plaintiff and the defendant, are stated and set forth in full according to their terms; and a demand or prayer by the defendant for the enforcement of its mortgage lien on the soda fountain sold to the plaintiff, by the defendant, amounting to the sum of *seventeen hundred dollars* with interest thereon at the rate of five per cent from the first day of April, 1901.

Record pages 13 to 30.

Eighth. On the twentieth of June, 1902, the plaintiff moved to transfer the cause to the law docket; and on the same date, by leave of the court, he dismissed his suit.

Record page 31.

Ninth. On the twenty-fourth day of July, 1902, the plaintiff, who was defendant in the cross-bill, or cross-complaint, filed his plea to said cross-complaint; and he averred therein as his only defense to said cross-complaint, "that the original bill filed by him has been dismissed; and that the cross-bill filed by the defendant, is not within the jurisdiction of said court, *because* the amount, under the allegations of said cross-bill, does not exceed exclusive of interest and costs, the sum or value of two thousand dollars; and that the plaintiff in said

cross-bill, seeks therein for a recovery against the defendant in said cross bill of a sum less than two thousand dollars, exclusive of interest and costs which said sum exclusive of interest and costs, sought to be recovered in said cross-bill, is the sum of seventeen hundred dollars only, which is the only matter or amount in dispute, in said cross-bill, or cross complaint.

Record page 32.

Tenth. On the thirteenth day of February, 1903, the plea to the jurisdiction of the court, which the plaintiff had filed to the defendant's cross-bill, was argued, and over-ruled by the court; and the plaintiff, the defendant in the cross-bill, was ordered to file an answer to said cross-bill on or before the the rule-day of said court occuring in April, 1903.

Record page 34.

The *subpœna* to answer the cross-bill was served on the defendant in that bill on the twelfth day of May, 1902.

Eleventh. On the twenty-first of April, 1903, no further answer or plea to said cross-bill having been interposed by the defendant therein, a decree *pro confesso* was rendered against the plaintiff in said suit; he being the defendant in the cross-bill.

Record pages 34, 35.

Twelfth. A final decree for the payment by the defendant in the cross-bill, being the plaintiff in the original bill, to the defendant in the original bill, and the plaintiff in the cross-bill, was rendered by the circuit court, after a hearing on the merits, on the twenty-seventh day of May, 1903, for the sum of eighteen hundred and eighty-three dollars, and twenty-nine cents, ($1,883.29), and the decree finds that the allegations of the defendant's cross-complaint and exhibits thereto are true; "and that the said W. S. Kirby is justly and truly indebted to the defendant, the American Soda Fountain Company, in the sum of seventeen hundred dollars ($1,700.00] with interest thereon at the rate of five per cent from April

first, 1901, said principal and interest amounting to the sum of eighteen hundred and eighty-three dollars and twenty-nine cents [$1,883.29], and that a valid mortgage existed on April first, 1901, and does now exist in favor of the American Soda Fountain Company to secure the payment of said sum of eighteen hundred and eighty-three dollars and twenty-nine cents [$1,883.29] on the property described in the decree, now in possession of said W. S. Kirby at his store in the city of Dallas, Texas; and the decree further provided that upon default being made by said Kirby, in the payment of said sum as provided in said decree, the said soda fountain upon which the said Kirby had executed a mortgage to the plaintiff in said cross-bill, should be sold, and the proceeds of the sale thereof applied to the payment of the indebtedness due from said Kirby to the American Soda Fountain Company as found by said decree.

Record pages 35, 36, 37.

Thirteenth. An appeal from said decree to this court was prayed by the appellant, and allowed on the tenth day of June 1903, and in the order allowing said appeal it is certified as follows:

"That this appeal is granted solely upon the question of jurisdiction which is set forth in the foregoing petition for appeal, is certified to the Supreme Court of the United States, in order that the Supreme Court may properly determine the question of jurisdiction—no other question having been tried in the circuit court."

Record pages 37, 38.

Assignment of Errors

III.

The errors assigned by the appellant are as follows:

First. The court had no jurisdiction to render the decree on the cross-bill, after the original bill had been dismissed

with leave of the court, without prejudice, *for the lack of jurisdictional amount in controversy.*"

Second. The circuit court should have sustained the plaintiff's plea to the jurisdiction interposed against the cross-bill; and dismissed the cross-bill.

IV.

The assignments of error are not sufficient to defeat the right of the appellee to have an order, dismissing this appeal for want of jurisdiction for the following reasons:

First. Because the circuit court had jurisdiction of the subject matter of the suit set forth in appellant's original and amended petitions or bills of complaint; as well as the matters stated set forth and charged in the defendant's cross-bill.

Second. Because the defendant having filed a cross-bill, or cross-complaint by leave of the court, could not be deprived of its right to have a hearing of the matters and things stated and charged in said cross-bill and to have a decree thereon even if the plaintiff or complainant in the original suit, had, with the leave of the court, dismissed the original petition, or bill before the hearing of the matters alleged in the cross-bill, and the decree thereon rendered in favor of the appellee.

Third. There was no error in the decision of the circuit court over-ruling the plaintiff's plea to the defendant's cross-bill, and in refusing to dismiss said cross-bill.

V.

Legal Propositions, Authorities and Arguments

A. The United States Circuit Court for the northern district of Texas, had jurisdiction of the suit commenced by the plaintiff in the 14th Judicial District Court of Dallas county Texas, by reason of the removal of said cause from said state court, to the United States circuit court for said district.

The plaintiff, both in his original, and in his first amended

petition, states a case which was within the jurisdiction of said circuit court, for the reason that the case stated in the proceedings in said cause, showed that the controversy involved therein was between citizens of different states, and the value of the amount in dispute, and sought to be recovered by the plaintiff, exceeded the sum of two thousand dollars, exclusive of interest and costs.

The value of the matter in dispute in this suit at the time the decree was rendered by the circuit court, was the damages the plaintiff claimed in his first amended petition and sought to recover from the defendant by reason of a breach of a contract made between the plaintiff and defendant on the twenty-sixth day of October, 1900, and filed in said court as part of the plaintiff's petition, or bill of complaint, on the twelfth day of December, 1901. The plaintiff's damages, as stated in his pleadings, are claimed to have been two thousand five hundred dollars, and this sum was sufficient to confer jurisdiction on the district court. The sum of seventeen hundred dollars was demanded from the plaintiff, by the defendant, in his cross-bill, or cross-complaint, filed in said cause, on the twelfth day of May, 1902. The aggregate of these two amounts, as showing the amount in dispute, in said suit, at the time the decree was made, was therefore *four thousand two hundred dollars;* and this sum was sufficient to invest the circuit court in which said suit was pending, with complete jurisdiction to hear said cause and to render a decree therein, either upon the original or cross-bill.

Jurisdiction of the Circuit Court

The act of August thirteenth, 1888, provided on this subject ts follows:

"That the circuit courts of the United States shall have cognizance concurrent with the courts of the several states of all suits of a civil nature, at common law, or in equity; *where the matter in dispute exceeds, exclusive of interest and costs, the sum or*

value of two thousand dollars, in which there shall be a controversy between citizens of different states."

Supplement of United States Statutes, Vol. II, second edition, 611.

The rule for the determination of the value, or amount in dispute, in order to give to this court jurisdiction of appeals or writ of error from the circuit court, is stated by Chief Justice Marshall, in Gordon vs. Ogden, 3 Peters, 33, 34, is as follows:

"If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due, may still be recovered, should the judgement for a smaller sum be recovered, and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action the judgement of this court can only affirm that of the circuit court; and consequently the matter in dispute cannot exceed the amount of that judgement. Nothing but the judgement is in dispute between the parties."

This appeal is prosecuted by the plaintiff in the circuit court and the principles above stated must be applied to the determination of this motion.

The principles in regard to the appellate jurisdiction of this court where "the amount or value of the matter in dispute" between the parties in the circuit court, determines the jurisdiction of this court, are asserted in numerous cases, where that question has been considered and decided; and the cases which have resulted from the discussion of that question by this court will be cited and referred to under *two* classes as follows:

First. Those which involved the construction of the *twenty-second* section of the Judiciary Act of 1789 under which the circuit court had jurisdiction where the matters in dispute in that court was *five hundred dollars;* and the right of appeal or writ of error was given to this court where the judgement or decree exceeded the sum of two thousand dollars exclusive of interest and costs.

Second. Those which involved the construction of the act

of August 13th, 1888. "The amount of the matter in dispute requsite to give this court jurisdiction on appeal or writ of error under that act, was increased from a sum exceeding two thousand dollars, to a sum or vaule exceeding *five* thousand dollars, exclusive of interest and costs.

18th Statutes-at-Large, 315.

(*a*) *This appeal must be dismissed on the authority of the decisions of this court in its construction of the twenty-second section of the Judicial Act of* 1789.

Under that act, the value of the amount in dispute *in this court*, in order to give jurisdiction on appeal or writ of error was two thousand dollars.

The authorities which give construction to that act are as follows:

Scott *vs.* Lunt, admr., 6 Peters, 349.
Smith *vs.* Honey, 3 Ibid, 143.
Meredith *vs.* John McKee, 1 Ibid, 248.
Oliver *vs.* Alexander, 6 Ibid, 143.
Spear *vs.* Place, 11 How, 523.
Rich *vs.* Lambert, 12 How 348.
Walker, *et al.*, *vs.* United States, 4 Wall, 163, 165.

In the last of above cases the Court, Chief Justice Chase delivering the opinion, used the following language:

"It has been a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed, or the amount of the judgement, or the amount in dispute in this court. It has been long settled, however, that when the judgement is for the defendant, or the plaintiff, *and for less than two thousand dollars, and the plaintiff sues out the writ of error*, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if the judgement is for the plaintiff, and not more than two thousand dollars, and the defendant prosecutes in error, this Court has not jurisdiction, *for the amount in controversy, as to the defendant, is fixed by the judgement.*

The record in this case shows that the decree was rendered in favor of the plaintiff in the cross-bill against the defendant in the said bill, who was the plaintiff in the original and amended bills. The principles declared in that case are sufficient to justify the appellee, in making this motion, and contending for the dismissal of said appeal even if the 22nd section of the Judiciary Act were still in force.

(*b*) The only effect of the passage of the act February 16, 1875, as amended and corrected by the act of August 13th, 1888, so far as it affected the appellate jurisdiction of this Court was to provide that after May 1st, 1875, the value of the matter in dispute in the circuit court, should be five thousand dollars, in order that this court might have appellate jurisdiction of judgements or decree of that court rendered subsequent to the date when that act took effect.

In its construction of that statute this Court has declared in numerous cases that it cannot entertain jurisdiction of judgements or appeals from the circuit court unless the amount in dispute exceeds that sum.

Telegraph Co. *vs.* Rogers, 93 U. S. 565, 567.
Shacker *vs.* Insurance Co., 93 U. S., 241, 242.
Thompson *vs.* Butler, 95 Ibid, 604, 607.
Parker *vs.* Morrill, 106 U. S., 1, 2.
Elgin *vs.* Marshall, 106 Ibid, 578, 583.
Troy *vs.* Evans, 97 Ibid, 1, 3.
N. Y. Elevated R. R. *vs.* Fifth National Bank, 118 U. S., 608.
Gibson *vs.* Shufeldt, 122 Ibid, 27.
Steamship Co. *vs.* Merchant, 133 Ibid, 375.
Wetmore *vs.* Rysner, 169 Ibid, 115;
Coffrey *vs.* Oklahoma Territory, 177 Ibid 346.

These authorities further justify the appellee in making this motion, and require the court to dismiss this appeal, unless the plea to the jurisdiction of the court, interposed by the plaintiff, to the defendant's cross-bill, shall be held to have put an end to the jurisdiction of the circuit court to entertain said

cross-bill, after the original and amended bills filed by the complainant had been dismissed.

It is certain as a legal proposition that the order of the court giving the plaintiff leave to dismiss his original and amended bills, did not dismiss the defendant's cross-bill, nor deprive the court of jurisdiction to hear, determine, and decree in respect to the matters stated in that bill. The plaintiff's original and amenned bills, and the defendant's answer and cross-complaint constituted the case, of which the circuit court had acquired jurisdiction by the voluntary action of the parties; and it was not within the power of either party, to deprive his or its contestant of the right to have a judicial determination of all the questions involved in the final decision of the judicial controversy presented in the case under the pleadings. The issues involved were neither uncertain nor doubtful. The plaintiff asserted damages under a written contract which he alleged had been obtained by the defendant by fraud and he asserted the right to have the contract delivered up and canceled and to be awarded damage for the deceipt and fraudulent representations of the defendant in making the contract, and to have damages on that account, to the amount of two thousand five hundred dollars. The defendant filed its answer and cross-complaint, and demanded an affirmation of the contract with the defendant; a decree for the payment of the balance due and payable on the contract, and an enforcement of the lien, it had under the contract, for the payment of the balance payable by the defendant in the cross-complaint, who is the appellant here. The defendant in the cross-bill could neither impair nor defeat the right of the plaintiff in that bill, to have the relief prayed therein by dismissing the original and amended bills, out of, and by reason of which the cross-bill came to be a part of the case made by the pleadings.

This proposition is very clearly stated by Judge Caldwell, in the case of Lowenstein *vs.* Glidewell, 5 Dill, 325, where the following language was used:

"Whether the dismissal of the original bill carries with it the cross-bill depends upon the character of the latter. If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiff in the original bill in the case thus made, *the dismissal of the original bill does not dispose of the cross-bill but it remains for disposition in the same manner as if it had been filed as an original bill.*"

The result of the reasoning and decisions upon this question with the authorities by means of which the conclusion of Judge Caldwell is reached, is stated in Daniel's Chancery Practice, Vol. 2, page 1553, 5th edition, note 3, as follows:

"If the cross-bill sets up matter purely defensive, and prays for no affirmative relief, the dismissal of the original bill necessarily disposes of the cross bill; but where the latter sets up, as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiff in the original bill, on the case just made, *the dismissal of the original bill does not dispose of the cross-bill; but it remains for disposition as if it had been filed as an original bill.*"

The Appeal is Frivolous and Should be Dismisssed for that Reason

The facts appearing in this record justify that statement; and the court is authorized to determine from the whole record whether the appellant is entitled to special consideration in the attitude in which he is revealed to the court by this record.

He commenced this suit in the state court, Dallas County, Texas, on May 16th, 1901, and he claimed in his original and amended petition, or complaint, the sum of two thousand five hundred dollars, as damages that he avers he sustained by the

non-performance of a contract made between him and the appellee on the twenty-sixth day of October, 1900.

The appellee filed a demurrer to said complaint as well as a denial of each of the allegations of said original petition, or complaint, at the term of the said court held in September, 1901; and the appelle afterwards, on the twelfth day of December, 1901, filed his first amended petition.

The cause was removed from the district court of Dallas county on the petition of the appellee, filed January 22, 1902, to the United States circuit court for the northern district of Texas.

The appellee on the twelfth day of May, 1902, filed its demurrer, answer and cross-complaint to the original and amended petition of appellant; and in its cross-complaint sought to recover from the appellant the sum of seventeen hundred dollars, with interest from April 1st, 1901, which remained due and payable from the appellant on the contract set out in the original and amended petition filed by the appellant in the state court, and to have a decree for the enforcement of the lien on the property sold by the appellee to secure the payment of the balance due from the appellant.

On the twentieth day of June, 1902, the appellant moved to transfer the case to the law docket, and also moved for leave to dismiss his original and amended petitions; and said petitions were dismissed.

On the twenty-fourth day of July, 1902, the appellant filed his plea to defendant's cross-complaint; and denied the jurisdiction of the court to entertain or consider the same, because the appellant having dismissed his original and amended petition the amount demanded by the appellee under the allegations of the cross-complaint, was less than two thousand dollars, to-wit: the sum of seventeen hundred dollars.

On the thirteenth day of February, 1903, the plea to the jurisdiction of the court which denied the authority of the court to entertain said cross-bill, was argued and over-ruled; and the appellant ordered to make further answer thereto, on or before the rule-day of said court occurring in April, 1903.

On the twenty-first day of April, 1903, the cross-bill was taken *pro-confesso* for want of an answer to said bill by the appellant and the appellant making no further defense to that bill by answer or otherwise a decree was made thereon in favor of the appelle for the amount above stated, on the twenty-seventh day of May, 1903; and from that decree this appeal is prosecuted.

The original and amended bills, and the defendant's cross-bill, was a legitimate and logical product of the appellant's original and amended bills; and the circuit court was authorized to examine these bills in considering the sufficiency of the cross-bill, even if the appellant had notified the circuit court that he would take nothing by said bills by withdrawing them from the consideration of the court, by having them dismissed. The cross-bill filed by the appellee was an auxiliary suit; and dependent upon the original suit; and can be sustained because the subject matter of the appellant's original and amended bills stated a case within the jurisdiction of the circuit court; and it neceesarily follows therefore that the circuit court had the right in determining the sufficiency of th plea filed by the appellant to the cross-bill, to consider the averments of the original and amended bills which were of record at the time the cross-bill was filed. At that time the original and amended bills were pending in the circuit court; and as the cross-bill related to grow out of, and was germain to the purposes and objects of the original and amended bill the circuit court in determining the sufficiency of the plea to the jurisdiction interposed by the plaintiff to the cross-bill, might with propriety consider the statements and purposes of the original and amended bill.

It is so certain as not to require serious or elaborate discussion, that if the circuit court had jurisdiction of the original and amended bill, it had jurisdiction of the cross-bill filed by the defendant to the original bill, against the plaintiff in that bill for the purpose of procuring a complete determination of a matter already in litigation; and this is what the cross-bill proposed to accomplish.

It is evident the plaintiff lost all interest in or desire to

have any hearing of the case he had instituted against the defendant as soon as the defendant put on record by demurrer, answer, and cross-bill, its defenses to said original and amended bills.

The defendant's demurrer, answer and cross-complaint, was filed on the twelfth day of May, 1902; and the plaintiff dismissed his suit on the twentieth day of June, 1902.

The record furnishes most satisfactory evidence that the plaintiff in the circuit court, and the appellant here had no desire to have any examination into the merits of the suit he had instituted against the appellee, in the district court of Dallas county; for as soon as the defense to that suit was disclosed by the answer and cross complaint of the defendant he dismisses the suit, to which the defendant had made its answer, and filed its cross-bill; and attempts to defeat the right of the defendant to the relief prayed in its cross-bill, by filing a plea, to the jurisdiction of the court to entertain the cross-bill, only because the appellant had dismissed the original and amended bill, to which he had summoned the appellee to make answer.

The plaintiff's plea to the defendant's cross-bill was properly overruled because that bill was an incident of and resulted from the original and amended bills which the plaintiff had filed. The circuit court had jurisdiction of those bills. The objection to the cross-bill, contained in the appellant's plea, had no support in any legal theory applicable to the bill so long as the original and amended bills remained a part of the record. Those bills contained sufficient allegations to give the circuit court jurisdiction of those bills filed by the appellant, by reason of the citizenship of the parties and the value of the subject matter in controversy. The cross-bill was between the parties to the original and amended bill, and relates to the subject matter of those bills. It was designed to aid in the final settlement of the controversy to which the appellant had made the appellee a party. The dismissal of the original and amended bills was a *trick* by means of which the appellant proposed to terminate the controversy without

any hearing on the merits; and there was no such hearing until subsequent to the dismissal by the appellant of his bills of complaint. The appellant had the right to have such hearing by making answer to the cross-bill or by retaining the original and amended bills for hearing. The record, submitted for the consideration of the court in the determination of this appeal, justifies the statement that the appellant is indebted to the appellee in the amount of the decree made by the circuit court against the appellant; and that there is no defense against the amount of said decree, except that which is involved in the determination of the following questions:

1st. Had the circuit court jurisdiction to hear and determine the original and amended bills filed by the appellant against the appellee in the 14th judicial circuit court of the State of Texas, and removed therefrom to the United States circuit court for the northern district of Texas?

2nd. Did the dismissal by the appellant, of his original and amendeded petitions, *subsequent to the filing by the appellee of its cross-bill deprive the circuit court of its jurisdiction to entertain the cross-bill and make a decree thereon in favor of the appellee?*

It is obvious that the answers given to these questions by the judge of the circuit court in his decision over-ruling the appellant's plea to the cross-complaint, and in his decree in favor of the appellee for the amount found payable by the appellant to the appellee are so conclusive as not to need further argument; and this court upon the examinations of the record, must conclude that this appeal was taken for delay only, and that the question on which the jurisdiction of the court depends is so frivolous as not to need further argument." The following authorities justify these contentions.

Whitney *vs.* Cook, 99 U. S., 607.
Hinckley *vs.* Morton, 103 Ibid, 764.
Micas *vs.* Williams, 104 Ibid, 556.
Swope *vs.* Leffingwell, 105 Ibid, 3.
Chanute City *vs.* Trader; 132 Ibid, 210.
Davis *vs.* Corbin, 113 Ibid, 687.
Walston *vs.* Nevin, 128 Ibid, 578.

New Orleans *vs.* Construction Co., 129 Ibid, 223.
The Alaska, 130 Ibid, 201.
Wheless *vs.* St. Louis *et al.*, 180 Ibid, 379.

This appeal should therefore be dismissed, and the decree rendered by the circuit court in favor of the appellee, affirmed.

JOHN J. WEED,
Attorney for Appellee.

Supreme Court of the United States.

No. 357.—October Term, 1903.

W. S. Kirby, Appellant, vs. American Soda Fountain Company. } Appeal from the Circuit Court of the United States for the Northern District of Texas.

[April 25, 1904.]

Kirby filed his first original amended petition in the District Court of Dallas County, Texas, against the American Soda Fountain Company, averring that he was induced by false representations by defendant to agree to exchange his soda fountain apparatus for the soda fountain apparatus of defendant and pay defendant $2,025 in addition, and signed a memorandum in relation thereto, which, however, plaintiff alleged did not contain all the terms of the contract; that the exchange was made, but defendant's soda fountain apparatus, instead of being superior in value by $2,025, was, as matter of fact, less by $2,500; and plaintiff prayed for the cancellation of the obligation to pay $2,025, for $2,500 damages, and for general relief. The original petition sought damages merely, and in the sum of $1,500.

On application of defendant the cause was removed to the Circuit Court of the United States for the Northern District of Texas.

The case was entered in that court May 12, 1902, and on that day defendant filed its answer, denying all charges of fraud, and setting up the written contract between plaintiff and itself, which it alleged contained all the terms of the agreement between them, whereby defendant agreed to manufacture and ship to plaintiff and plaintiff purchased of defendant a certain soda fountain machine at the price of $3,219; and defendant agreed to take plaintiff's machine in part payment at the sum of $1,194, leaving a balance of $2,025, which plaintiff agreed to pay, and which was secured by a mortgage lien on the property. That defendant manufactured and shipped the machine to plaintiff and set it up in his store, and fully complied with the contract, but plaintiff, after paying $325 on account of the $2,025, failed and refused to further comply with the contract or to pay anything more thereon.

Defendant said plaintiff ought to take nothing by his suit, and prayed judgment for the sum of $1,700 and for foreclosure of its mortgage lien. Together with its answer defendant filed its cross complaint, setting up the facts in detail and praying for judgment in the sum of $1,700, and interest, and for a decree establishing its mortgage lien on the property and for foreclosure and sale, and such further relief as equity might require.

Subpoena on the cross complaint was issued and served May 13, 1902.

June 20, 1902, plaintiff moved to transfer the cause to the law docket; and on that date the following order was entered of record: "Complainant coming and asking that the original bill of complaint be dismissed without prejudice, and it appearing to the court that said request should be granted. It is therefore ordered that the original bill of complaint herein be and the same is hereby dismissed without prejudice to the right of the plaintiff to proceed further on the cause of action set forth in said bill hereafter as he may be advised. It is further ordered that the costs of the original bill and proceedings thereon herein be adjudged against complainant for which execution may issue."

July 24, 1902, plaintiff, as defendant in the cross complaint, filed his plea thereto, in which he averred that the original bill filed by him had been dismissed, and that the cross bill was not within the jurisdiction of the court because the amount sought to be recovered did not exceed two thousand dollars, exclusive of interest and costs. February 13, 1903, the plea to the jurisdiction of the court was argued and overruled, and plaintiff, defendant in the cross bill, was ordered to file an answer to said cross bill on or before the rule day of the court occurring in April, 1903. No further answer or plea to the cross bill having been interposed by the defendant therein, a decree *pro confesso* was rendered against him April 21.

On May 27, 1903, the court rendered a decree on the cross bill, which recited the various proceedings; found the allegations of the cross complaint and exhibits to be true; that Kirby was justly indebted to the American Soda Fountain Company in the sum of $1,700, with interest; and that a valid mortgage lien to secure that sum existed; and decreed payment of the amount within sixty days, and that, if not paid, the property should be sold and the proceeds applied, with judgment for deficiency, if any.

An appeal from this decree was prayed and allowed, and the question of jurisdiction was certified. The case came on in this court on motions to dismiss or affirm.

Mr. Chief Justice FULLER delivered the opinion of the Court:

This case was brought directly to this court on a certificate of jurisdiction under section five of the judiciary act of March 3, 1891, and might, therefore, have been advanced under Rule 32. The motions to dismiss or affirm may be treated as equivalent to submission under that rule, but as the motions were made, and the motion to dismiss was chiefly rested on the ground that the value of the matter in dispute was not sufficient to give this court jurisdiction, we think it proper to say that "the act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either

of this court or the Circuit Court of Appeals, from a District or Circuit Court of the United States." *The Paquete Habana*, 175 U. S. 677, 683.

On this appeal no question of error in matter of equity procedure in the retaining of the cross bill after the dismissal of the bill is open for consideration, but we do not intimate in the slightest degree that any error in that particular was committed. *Chicago, M. & P. Railway Company* v. *Third National Bank*, 134 U. S. 276; Daniell Ch. Pr. (5th ed.) 1553, note; Bates Eq. Proc. § 386.

The contention is that the Circuit Court had no jurisdiction as a court of the United States to proceed on the cross bill because of the lack of the prescribed jurisdictional amount. But we think the Circuit Court was right in rejecting this contention and in overruling the plea.

In the first place, the whole record being considered, the value of the matter in dispute might well have been held to exceed two thousand dollars, exclusive of interest and costs. *Stinson* v. *Dousman*, 20 How. 461, 466; *New England Mortgage Company* v. *Gay*, 145 U. S. 123, 131; *Shappirio* v. *Goldberg*, 192 U. S. 232; *Lovell* v. *Cragin*, 136 U. S. 130.

In *Stinson* v. *Dousman*, the suit was brought to recover something less than five hundred dollars as rent of a parcel of land under a written contract for the purchase of the land at eight thousand dollars, which provided that the covenantee should pay rent on failure to comply with sundry conditions prescribed, and defendant not only set up in his answer a defence to the claim for rent, but also sought a decree affirming the contract as outstanding. It was objected in this court that the matter in dispute was not of the value of one thousand dollars, and that therefore there was no jurisdiction. Mr. Justice Campbell said: "The objection might be well founded, if this was to be regarded merely as an action at common law. But the equitable as well as the legal considerations involved in the cause are to be considered. The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at $8,000. We think this court has jurisdiction." The case is cited and considered in *New England Mortgage Company* v. *Gay* and in *Shappirio* v. *Goldberg*.

In *Lovell* v. *Cragin*, it was held as correctly stated in the head notes: "When the matter set up in a cross bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of the plaintiff's case, the amount claimed in the cross bill may be taken into consideration in determining the jurisdiction of this court on appeal from a decree on the bill."

In the present case the Circuit Court in its decree referred to the plaintiff's bill and the relief thereby sought, in connection with the cross bill, and, we think, was justified in doing this as the record had not passed from under its control, and it was apparent that the decree on the cross bill disposed of the contention of plaintiff in respect of the cancellation of the contract. Taking the bill, defendant's answer and the cross bill together, the jurisdictional amount was made out.

In the second place, it is the general rule that when the jurisdiction of a Circuit Court of the United States has once attached it will not be ousted by subsequent change in the conditions. *Morgan* v. *Morgan*, 2 Wh. 290; *Clarke* v. *Mathewson*, 12 Pet. 165; *Kanouse* v. *Martin*, 15 How. 198, 208; *Roberts* v. *Nelson*, 8 Blatchf. 74; *Cooke* v. *United States*, 2 Wall. 218.

In *Morgan* v. *Morgan* it was laid down by Chief Justice Marshall that the jurisdiction of the Circuit Court having once vested between citizens of different States, could not be divested by a change of domicil of one of the parties, and his removal into the same State as the adverse party *pendente lite*. This was so ruled in *Clarke* v. *Mathewson* and other cases there cited.

In *Kanouse* v. *Martin*, after petition to remove had been filed and bond tendered, the State court allowed the plaintiff to reduce the matter in dispute to less than the jurisdictional amount, and went on with the case. This was necessarily held to be erroneous, but the observations of Mr. Justice Curtis show that, in his opinion, the general rule to which we have referred also applied, and he cites *Morgan* v. *Morgan* and *Clarke* v. *Mathewson*.

In *Roberts* v. *Nelson* the amount claimed was reduced after the case had been removed, and Mr. Justice Blatchford, then District Judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it.

In *Cooke* v. *United States*, Mr. Chief Justice Chase said that "jurisdiction once acquired cannot be taken away by any change in the value of the subject of controversy."

This action, when brought in the State court, was an action to recover $1,500 damages for deceit. Defendant demurred to and answered the original petition. Plaintiff subsequently filed his amended petition seeking to be relieved of the obligation to pay $2,025, and damages in the sum of $2,500. The matter in dispute having thus been made to exceed the sum or value of two thousand dollars, exclusive of interest and costs, defendant presented his petition and bond for removal, and the cause was thereupon removed. The jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action.

Decree affirmed.